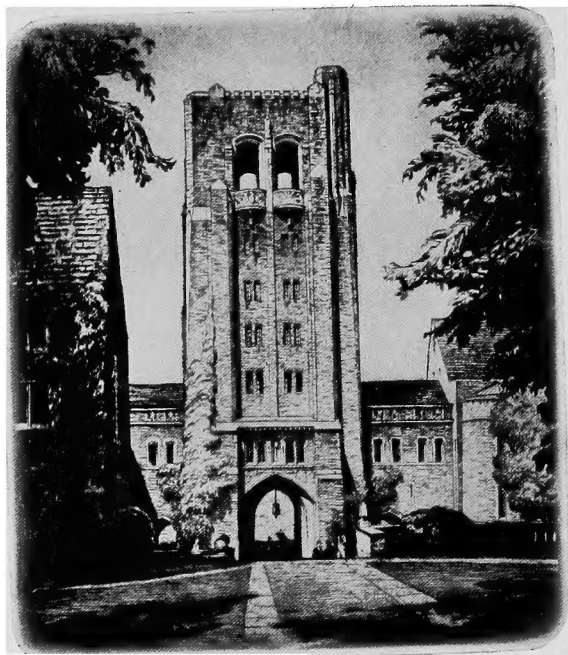


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THE LAW
OF
BANKS AND BANKING

INCLUDING

ACCEPTANCE, DEMAND AND NOTICE OF DIS-
HONOR UPON COMMERCIAL PAPER

WITH AN

APPENDIX

CONTAINING THE

FEDERAL STATUTES APPLICABLE TO NATIONAL BANKS

BY
JOHN M. ZANE
OF THE CHICAGO BAR

CHICAGO
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1900

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PREFATORY NOTE.

It is the aim of this treatise to present all the law that can be properly considered as applicable to the business of banking. The work is expected to be of use not only to lawyers, but also to bankers; and on this account not only the law as to the right of banking, the methods of carrying on a bank, the rights of stockholders in banking corporations, the liabilities of bank officers and their powers, as well as the law as to deposits, collections, securities, savings banks and clearing-houses, but also the law governing the duty of the holder of commercial paper as to demand for acceptance and for payment and notice of dishonor, has been included. The cases have all been consulted, it is thought, and their results have been included. No opportunity for compression has been omitted, but this result has not been sought at the expense of fullness of detail. Upon principles about which there has been no dispute it has not been considered desirable to multiply citations. There has been no hesitation in condemning cases not properly decided, but the case itself has not been passed by on that account.

The law as to national banks will be found fully treated in the course of the work. But it was not considered proper to divide the work arbitrarily into two parts, since the great mass of banking transactions, whether made by state or private banks, or by national banks, is governed by the same rules. For example, the law governing deposits or

collections, or the liabilities of bank officers, or their powers in binding the bank, does not differ, except in small details, whether the bank be a national or a state bank. The labor of the lawyer in consulting the work is merely doubled by such a division. But in order to save the practitioner or the banker the necessity of consulting the Federal statutes, the various sections of the Revised Statutes of the United States and the acts amendatory thereof, which have any bearing upon national banks, will be found in the appendix.

The reasons that require a treatise of this description, the principles which render this particular department of the law distinctive, will be dwelt upon in the Introduction, which precedes the body of the work. In that connection the author will explain and refer to the considerations which indicate that there is something new to be said upon the topics treated. And while not desirous of impugning the truth of the wise man's statement that there is nothing new under the sun, yet the author has found that there may be a new reason given for an old doctrine—a reason, too, which solves properly many a troublesome case likely to arise.

CHICAGO, *January 1, 1900.*

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APPENDIX I. FEDERAL STATUTES IN REGARD TO NATIONAL BANKS.

THE LAW OF BANKS AND BANKING.

INTRODUCTION.

In the history of the common law the conception of a bailment is much older than the conception of agency or trust. These three things, which are so distinctly differentiated at the present day, have one attribute in common: a confidence is reposed by one man in another to whom he intrusts property or property rights. It is upon that ground that an equitable remedy can be applied to each relation. In a stage of society where the modern law of contract and of trusts was wholly undeveloped, because there was no occasion for it, the remedies given by the law for the enforcement of such obligations were bound to be more or less crude and inadequate. In process of time the courts of equity were to seize upon the idea of a trust, and out of it were to construct a large portion of their jurisdiction. But the common-law courts, while losing their control over trusts, were to retain jurisdiction over those other trust relations which are called bailment and agency. From remote times the notion of a bailment was familiar to the common law. Bracton had copied much of the Roman law upon the subject, and his borrowed learning was long afterwards to form the basis of Lord Holt's celebrated judgment in *Coggs v. Bernard*. For the relation of bailment the common law from an early period furnished a remedy, just as later it was to furnish a remedy for that other case of trust and confidence which we call agency or procuration. Remote as this fact seems, it

has given to the business of banking certain characteristic legal features. The word *deposit*, misused as it now is in banking, originally expressed the exact legal function of the banker; he was the bailee of money or property delivered to him for safe keeping, to be returned by him at the bailor's request. This is one of the well known species of bailments. But the English law, for reasons that would require too much space to enumerate, gave to the bailor a single remedy in the alternative. He could either recover his property or its value. If the bailee refused to deliver, he could obtain only its value. The law did not undertake to deliver back to him the specific thing. In banking the especial propriety of this remedy appears where the thing bailed was money, for one piece of money was as good as another piece of the same denomination. At the same time the action of debt was originally for so much property, describing it, which the defendant unjustly detained. It is apparent that the direct effect of both these remedies was to transform the bailment or deposit of money with a banker into a debt arising out of the relation of debtor and creditor.¹ Business convenience, no doubt, did its part toward this result, but the remedy must have greatly assisted in this transformation. But the old idea of a bailment did not entirely disappear. The invention of the action on the case, of which *assumpsit* was a species, gave to the bailor his action for damages when the bailee refused to return the thing bailed, and those damages were held to include all the damages arising from the breach of the duty to return. The invention of checks adapted itself to the remedies in existence, and hence it is that the depositor to-day has his two remedies: an action of debt, and an action on the case for damages for the banker's breach of duty in not returning the deposit.² But the history of the banking relation teaches a valuable lesson to-day. It completely justifies those courts which deny to the holder of the check the right to sue the banker upon the check; for suppose the bailor had delivered to his bailee twenty horses

¹ See § 128, *post*.

² See § 145, *post*.

and had given some one an order to go and get one of the horses, the common law and common sense would both tell us that the holder of the order was simply the bailor's agent to demand a return, and that the bailor must sue.³

But this historical development shows another thing, and that is that the duty annexed to the banker's reception of the deposit is, as the courts are bound to recognize, wholly a customary duty, and is therefore a duty arising out of a custom so old that it is law. It is, indeed, a customary duty so old that the mind of man runneth not to the contrary. It is therefore a duty arising out of law, not out of agreement, and is *quasi ex contractu*. This most difficult subject in the law has lately received an able and long needed examination from those American jurists whose work has done so much for the law and whose labors have reflected so much renown upon our legal scholarship. This customary duty is enforced by the same action on the case that enforces the customary duty of the common carrier, where the duty was laid centuries ago always as founded upon the custom of the realm. This consideration also proves to us how wanting in historical sense are those courts and text-writers who found the check-holder's right to sue upon a customary duty owed by the banker to the check-holder.⁴

But in another branch of banking law the idea of bailment has been fruitful of important consequences. It was once well understood that the deposit with a banker of business paper requiring collection was a bailment, to which custom had also annexed certain important duties. By the accident of the remedy furnished by a primitive age the bailor could hold only his bailee, while the bailee was owner of the thing bailed as to the rest of the world. Gradually the idea of the bailor's ownership was to gain ground, and his right of property as against the world became recognized. But side by side with it remained the old conception of the bailee's right to recover the thing bailed against the world. But in this country courts and text-writers have

³ See § 147, *post*.

⁴ See § 147, *post*.

become confused, just as the lawyers of the Middle Ages did, between agency, trust and bailment, so that to read the lucubrations of courts upon this question is like going back several hundred years and listening to some Elizabethan Clench or Gawdy ratiocinizing over these superficial resemblances. We have one court saying the deposit for collection creates an agency; we have another court saying the banker becomes a trustee; yet the one court permits the agent to sue as owner, which he could not do if he were an agent, and the other court permits the owner of the collection to sue his banker at law for negligence, which could not be done if he were a trustee. But the English courts by an unbroken tradition, and some of our courts by reflection, have been enabled to see that the right of the banker to sue as owner at law and the right of the owner to sue the banker at law for negligence belongs only to the relation of bailment.⁵ This historical development solves easily the question which so unfortunately divides the courts, and proves beyond question that the correspondent banks are the agents of the bailee, the bank to which the paper is intrusted for collection, where the owner does not himself select and treat with the correspondent bank. Astonishing and incredible as it may seem, one court — the Supreme Court of Illinois — at an early period held that a deposit of paper for collection with an express company was a bailment and made the first company responsible for its correspondents; yet the same court is heard later asserting in stentorian tones that the same deposit with a banker creates an agency, when the first bank is not liable for the defaults of its correspondents.⁶ This idea of a bailment solves, too, the reasons why the owner of the paper can reclaim the proceeds from a correspondent bank. It shows what is the nature of the title that passes from the bailor to the bailee upon a deposit in a bank of paper which requires collection. Grossly erroneous, therefore, is the holding of those courts which say an absolute title passes upon a deposit for credit of paper to be collected, and

⁵ See §§ 171, 133, *post*.

⁶ See note 2, § 186, *post*.

of that other court which says that the banker cannot sue as owner.⁷ Harsh, indeed, is the penalty the law is paying to-day for those generations of lawyers who were wholly unfamiliar with the banking business and thus lost touch with the conceptions of the common law.

The disregard of these conceptions of the common law, both by courts and text-writers, has caused the many irreconcilable differences between courts upon ordinary questions in banking law. Those generations "which knew not Jacob" have entailed the expiation of their sins upon us. And it is the idea of bailment which, properly carried out, will render banking law symmetrical and uniform the country over. But in other spheres of law banking has caused a great development, especially in the law of agency and stockholders. A bank, being officered by men generally of wide interests and of large business connections, finds itself involved in transactions where its officer and agent is frequently acting for himself or for some one else. These questions generally arise in the law of banking. And here again the common law comes forward with its principle of identity which it has borrowed from the Roman law—a principle which an American juridical scholar has developed by his influence upon one court, and by his writings, which lend to our jurisprudence some of the glory which clings round an Ulpian or a Trebonian. In the blunt phrase of the Roman annotator this identity arises *non rei veritate, sed fictione*; it was adopted by our common law after the fullest consideration of its advantages, and after the experience of centuries of that system which knew it not; it solves many a troublesome question in the law of agency, and stamps with disapproval the lucubrations of those courts which seek for a basis of the identity of principal and agent, where the agent duly authorized is acting on the principal's business, in some such presumption as that the agent will communicate his knowledge to his principal. Such reasoning, as we shall see, is futile when applied to a transaction where principal and

⁷ See §§ 133, 187, 188, *post*.

agent are identical, and has been productive only of confusion.⁸ A correct appreciation of this principle is the only test by which questions of this character can be decided. The want of this appreciation has caused the text-writers to darken counsel upon this subject by words without knowledge. But in another phase of the law of agency the business of banking has offered much material for judicial exposition. The relation of a director or officer to his corporation has been involved in a complete fog by the fact that some very able judges have been blind to the fact that the keeping open of an insolvent bank by directors, either wilfully or negligently, is one thing, and that negligent management of a bank is a totally different thing. On this subject, too, the text-writers have not given us any light, because they have not taken care to find that their light was but darkness. In the domain of the law of stockholders the usual liability of double the stock subscription imposed by statute upon stockholders has produced a great development; and here again, the conception of *quasi*-contract explains for us that this liability is not a contract, though the supreme court of the United States, in days when a *quasi*-contract was not well understood, has told us that it was.⁹ This law of *quasi*-contract informs us that the *quasi*-contract imposed by the statute is not a contract obligation; but nevertheless the obligation and the duty of a man to perform the *quasi*-contract gives a valuable and vested right to the man to whom the duty is owed, and as to past transactions cannot be taken away by statute, because to do so would be a confiscation of property — a taking without due compensation. This conception proves, as we shall see, that the supreme court of the United States gave a wrong reason for a very righteous decision, which is not an unusual phenomenon in the progress of the law. Again, the subject of banking law gives a wide sphere for the action of the healing and healthful doctrine of *quasi*-contract in regard to acts done beyond the sphere of corporate power, than which no subject in the law has

⁸ See §§ 111, 112, 106, 107, *post*.

⁹ See § 63, *post*.

been examined by our highest court with less perception of the effect of *quasi*-contract upon legal obligations.¹⁰ Finally, the law of banking offers a wide and extended field for the operation of customs in adding terms to contracts or *quasi*-contracts,¹¹ in defining the duties of officers of banks as well as their powers,¹² and in circumscribing the appropriate sphere of banking transactions. It is then for the reasons stated above that the law of banking is distinctive. Its doctrine of bailment runs a line of demarcation between it and other businesses as plain as the division which separates that of common carriers from other businesses, while the field of operation which it affords for an application of the doctrines of *quasi*-contract makes it no less distinctive. Being so distinctive, it is hoped that a work upon this subject may aid in showing the proper application of general principles in a peculiar field.

Where a business which is so important as that of banking is found exposed to contradictory rules of law, it is especially needful to point out the better and safer rule. It needs especial emphasis in these times that a banker is of all men entitled to a certain and fixed rule of law, because he has confided to him the pecuniary interests of so many people. He is using and investing a fund with which all classes in the community have a direct connection. But when we find that in the same state the banker must conform himself to doctrines that are absolutely irreconcilable, and, if he follows the one rule, another court in the same jurisdiction following the opposite rule is bound to hold him for violating its rule, it is patent that the law needs some rectification in those jurisdictions.¹³ The rules of law applicable to banking transactions are not of the character of those principles which have become rules of property. Those jurisdictions which have adopted an erroneous rule will find that the inconveniences of the rule will cause it to be evaded by the business world, and a change in the rule would make the

¹⁰ See § 33, *post*.

¹¹ See §§ 113-117, *post*.

¹² See § 105, *post*.

¹³ See note 30 to § 147, *post*, note 26 to § 138, *post*, note 22 to § 140, *post*, and note 2 to § 139, *post*.

law conform to the settled business practice, and would cause hardship to no one.

The examination of cases upon the law of banking will convince any lawyer that there is hardly a single influential doctrine connected with the subject upon which courts of high authority have not reached precisely contradictory conclusions. The evil is aggravated by the fact that such courts have in many cases concurrent jurisdiction, so that a man who has followed the rule of one court finds himself in the wrong, if his adversary can bring him before another court. One thing is certain, and that is one of the courts must be wrong. There is an anecdote which has been ascribed to Sidney Bartlett, the great practitioner, although the original is no doubt as old as the profession; it runs in this way. He was seen one day reading a late volume of his state reports. Some one asked him: "Are you reading law?" "No," he replied, "I am reading the decisions of our Supreme Judicial Court." This story aptly illustrates the fact, which the history of the law emphasizes, that the decisions of courts are not always correct expositions of the law. This failure in the administration of the law is aggravated, and in some instances, no doubt, is due to the inadequate presentation of a case by the lawyer. Added to the uncertainties of human evidence and the imperfections of a jury tribunal, the sum total of uncertainty becomes almost appalling. Justly or unjustly the whole blame for this condition is laid upon the practicing lawyer. In all ages of civilized society of which we have any record, wherever a legal profession has existed, there can be no doubt that its members have been exposed to the deepest distrust among the great mass of mankind. Sage and saint, poet and wit, dramatist and novelist, satirist and even lawyer, have all had their flings at the profession. The picture painted for us by Plato of the working lawyer and of his life of bondage, who has been stunted and warped and made small and crooked of soul, a poor broken and bent creature without a particle of soundness in him, although exceedingly smart and clever in his own esteem, gives us

the word of the sage upon the bar. The saint exclaims: "Woe unto you also, ye lawyers, for ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers." But even to satisfy a saint a lawyer could hardly be expected to pay the judgment when he loses a case. Addressed to a judge who has made an incorrect decision the remark has some relevancy. The wit tells us that "the law is a hocus pocus science: it smiles in your face while it picks your pocket; and the glorious uncertainty of it is of more advantage to its professors than the justice of it." The dramatist talks patronizingly and pityingly of "old Father Antic, the law." The novelists have exhausted their powers in picturing the rascal, the pedant or the buffoon in legal garb. The satirist adds for the benefit of the client:

"There take (says Justice), take ye each a shell,
We thrive at Westminster on fools like you.
'Twas a fat oyster,—live in peace,—adieu."

Sir Thomas More, himself an example of professional rectitude, banished lawyers from his Utopia. Even the gentle Melancholiast becomes incensed enough to say: "Our wrangling lawyers are so litigious and busy here on earth that I think that they will plead their clients' causes hereafter—some of them in hell." He seems to insinuate that the bench will be found in that locality also, fully prepared to hear argument. Lord Bacon, forgetting the fragile character of his legal residence, somewhere suggests that the courts are like the bush whereunto the sheep flies for refuge, but is sure to lose a large part of his fleece. This consensus of opinion is certainly trying to the profession, and lawyers, no doubt, feel this universal obloquy. They are consoled by the reflection that whenever one of these various descriptions of people gets into trouble he invariably resorts to one of the long robe for protection.

But we cannot be wrong in ascribing much of this disesteem to the uncertainties in the law created by erroneous opinions of courts. It is not strange that in a calling which demands the highest mental powers many should be found

wanting. All men must recognize that upon the bench there may be found men without either the capacity or the industry to reconcile the law with the demands of justice; yet it is no less certain that the case is very rare where such a result is impossible. Those judges who cannot attain this result are those who preach the absurd doctrine of "less law and more justice," and commit waste upon the inheritance. The good judge is the rarest thing in the world, and he is as rare in appellate as in *nisi prius* tribunals. He must have not only a wide and profound knowledge of the law, but the capacity to call all his knowledge to his aid. Acuteness in discrimination he must have, but it will not avail him unless he adds to it the mental power which carries general principles with their applications through long and often complicated matters of fact. But to both those qualities he must bring the support of that constructive imagination which enables him to see the relation of particular instances to the vast body of doctrine which makes up the science of law. Just as necessary is it for him to have that vivid sense which amounts to an intuitive perception of justice. Yet quickness to apprehend, readiness in discrimination, luminosity of thought, are alike unavailing, if not united to that rarer power of suspending judgment until all the considerations the case offers may be fully and fairly presented. This capacity to hear patiently without prejudgment is not often granted to mortals. Rare, indeed, is

"The calm eye that seeks
Midst all the huddling silver, little worth,
The one thin piece that comes pure gold."

It cannot be strange, then, that there are many erroneous decisions. And this fact imposes upon every one who examines the adjudications for the law, the duty of never passing by an error. It may be that the exposure of the error will do little good. It is a melancholy fact that the demolition of the false *dicta* of *Nichols v. Eaton* in Gray's Restraints upon Alienation has not stayed for a moment the mistaken decisions of courts, following that most erroneous deliverance of our highest court. But in good time

we all must have faith to believe that the sound rule of law will prevail. To aid in this consummation every lawyer, and every law writer, however humble his efforts may be, owes it to the science which he professes, unhesitatingly to condemn error. No right-thinking man, lawyer or judge, would wish his mistake to redound to the discredit of this "noblest of sciences," which has for centuries been waging the battle for human welfare, and will continue to wage it long after we are forgotten. Every one who is a true minister at the altar of justice (*justitiam namque colimus et sacra jura ministramus*), every one who feeds that sacred flame, is doing his share to free the law from the reproaches that are uttered against her, the sins of maladministration which she is called upon to expiate. It is fortunate that men and their errors count for little in the life of the law. Steadily she moves on to her goal, casting off the false doctrines laid thickly upon her.

"Yes, we arraign her, but she
The weary Titan, with deaf
Ears and labor dimm'd eyes,
Regarding neither to right
Nor left, goes passively by;
Bearing on shoulders immense,
Atlantean, the load,
Well nigh not to be borne
Of the too vast orb of her fate."

CHAPTER I.

BANKS, ORGANIZATION AND PROOF OF EXISTENCE.

§ 1. **General classification.**—The terms *bank* and *banker* represent conceptions so commonly understood that a satisfactory definition or classification ought not to be difficult. But banks may be defined by reference to their mode of organization, their methods of doing business, or the functions which they perform. Thus, with reference to their mode of organization, banks may be separated into those which have a corporate form and those which have not such a form, *i. e.*, corporate banks and private banks. Corporate banks would require a division into national banks, which are organized under the federal law, and state corporate banks, which are organized under state laws. Private banks would require division into individual bankers, partnerships and joint-stock companies. But such a division fulfills no useful purpose and is merely formal. Again, with reference to their methods of doing business, banks may be divided into commercial banks and savings banks; but this division is not useful, because the term “savings bank” no longer defines a bank which has no capital stock but divides its profits among its depositors, for many savings banks are now merely commercial banks. Other banks have two departments—a savings counter and a commercial counter. A constantly increasing type of bank is now the trust company, so called. This term is sometimes applied to an ordinary commercial bank; at other times a trust company, besides carrying on a banking business, such as receiving deposits and discounting commercial paper and collecting exchanges, has a department wherein it receives and executes trusts of various kinds, which is not a banking business at all. Often the trust company adds to its other functions a savings department. But this method of classifying banks fulfills no useful purpose, un-

less the term "savings bank" is restricted to the old type of savings bank, which shows tendencies toward obsolescence. Regarding banks with reference to their functions, the usual division would be banks of issue, banks of discount, and banks of deposit. Banks of deposit would include savings banks. But this division is not valuable, for the reason that there are no banks purely of issue or purely of discount. The national banks alone are banks of issue, but they are also banks of deposit and discount. State banks of issue no longer exist, but all commercial banks, corporate as well as private, are banks both of deposit and discount. Therefore this division fulfills no useful purpose, but it is advantageous as an aid in defining the meaning of the term "banking powers." Since this latter term is often used in statutes in a general way, it becomes absolutely necessary to define the term "bank," and thus, as incidental thereto, to define the phrase "banking powers." This definition must be sought for in the decisions. But in law as in every other science, where terms in common use are utilized, the meaning of a word will often vary with reference to the circumstances in which it is used. From one point of view in the law, courts have found it necessary to define the word "bank" in terms which will not be satisfactory from another point of view. It is a truism, frequently disregarded, that the language of a court should never be considered apart from the circumstances of the particular case in regard to which the language is used. Especially is it true that the framers of statutes and constitutions have used legal terms without any accurate judgment of the result. The courts, in consequence, in order to do justice to litigants, have often been compelled to do violence to language. In construing a penal or prohibitory statute, the word "bank" has had in some instances a different meaning from that which it has borne to a court construing a revenue or a license tax law. It will therefore be sought to define the words "bank" and "banker" with reference to the language of decisions, keeping in mind the particular connection in which the language is used.

§ 2. **General definition.**— A learned and generally accurate judge,¹ attempting a general definition, has defined a banker to be “one who keeps a place for the traffic of money; who there receives it from others and keeps it with his own, using the whole fund as his own, or remits it at request to other places; who repays it at the will and call of his customer; who furnishes money to others on the discount of their obligations, or on securities brought by them; and who buys and sells bills of exchange. To these is sometimes added the issuing of his notes to pass as money, when allowed by law to do so.”² This definition ignores, however, savings banks as that term was originally understood. In a brief of D. B. Ogden, 13 Pet. 530, and in *Bank v. Collector*, 3 Wall. 495, repeated by the same judge,³ with a historical summary, in *Oulton v. Savings Institution*, 17 Wall. 118, is the usual definition found in the encyclopedias: “Banks, in the commercial sense, are of three kinds, to wit: 1, of deposit; 2, of discount; 3, of circulation.” To this is added by the court the statement: “All or any two of these functions may, and frequently are, exercised by the same association, but there are still banks of deposit without authority to make discounts or issue a circulating medium.”⁴ The court also states that any one of the three functions makes a bank.⁵ But this latter statement is not accurate, because a discounteer of notes, who is often called a “note-shaver,” is not ordinarily considered a banker,⁶ nor is one who loans his

¹ Foulger, J. Compare with this definition the language of section 3407, Revised Statutes, and the decision in *Richmond v. Blake*, 132 U. S. 592. The decisions in *Bank v. Collector*, 3 Wall. 495, and *Oulton v. Savings Institution*, 17 Wall. 118, proceed upon the same general theory of defining the term by reference to the business functions which the banker performs.

² *People v. Doty*, 80 N. Y. 225, 228. This definition is not expressed in terms so general (but which are

fully as accurate) as the phrase of Mr. Horn: A bank is “an office for the circulation of capital in the form either of accumulated labor (money of all kinds), or of labor yet to be done (credit).” 1 *Encyc. Pol. Science*, 228.

³ Clifford, J.

⁴ *Bank v. Collector*, *supra*.

⁵ *Oulton v. Sav. Inst.*, *supra*.

⁶ *People v. Brewster*, 4 Wend. 498. But this case is perhaps to be better considered as a case of statutory construction. See *People v. Bar-*

own capital. It has been held that merely receiving deposits was not banking;⁷ but another court has said that, where a couple of attorneys own a private bank, which receives deposits, they are to be considered bankers under the terms of a penal statute.⁸

§ 3. Under revenue laws.—It is apparent that courts, in construing revenue laws, will give terms a wider meaning than when construing a penal statute, or a statutory or constitutional prohibition, when it is sought to bring an individual within the terms of the statute. The business of banking, under the license tax law, consists, among other things, in having a place of business where money is received on deposit and paid out upon checks or loaned upon security.¹ But a so-called loan company which did not receive deposits, but loaned its own capital on realty security, and sold and guaranteed its mortgages, was not a bank under this statute.² It seems reasonably certain that a place of business performing either the banking function of deposit or that of issue would be considered a bank. The same cannot safely be said of a business confined wholly to discounting. One court has held that a banker can be compelled to pay a license on the ground that he is a "money-changer."³ This last decision is historically correct, because originally the sole business of the mediæval prototype of the modern banker was exchanging the different varieties of money.⁴

tow, 6 Cow. 290, and *Curtis v. Leavitt*, 15 N. Y. 9, 56.

⁷ *Corwin v. Insurance Co.*, 14 Ohio, 6.

⁸ *Commonwealth v. Sponsler*, 16 Pa. Co. Ct. R. 116.

¹ *Warren v. Shook*, 91 U. S. 704.

² *Selden v. Equitable Trust Co.*, 94 U. S. 419. The statute was 13 Stat. at Large, 252, carried into sec. 3407, Rev. Stat. U. S.

³ *Hinckley v. Belleville*, 43 Ill. 183. But a savings bank authorized

to deal in notes, drafts and bonds, and buy and sell bills of exchange, is not a money broker or exchange dealer under a license statute. *State v. Field*, 49 Mo. 270. This decision seems to be based upon the idea that it would be impossible to imprison the corporation.

⁴ 1 *Encyc. Pol. Science*, 232. The historical *excursus* in *Oulton v. Sav. Inst.*, 17 Wall. 118, is hardly accurate.

§ 4. Under constitutional and statutory restrictions.—

The general restrictions against banking in constitutions have been without exception held to apply only to banks of issue. Courts have been compelled to apply harsh measures to constitutional absurdities. Thus in California the constitution (art. 4, sec. 4) prohibited the grant of a charter for banking purposes. A later section (35) of the same article stated emphatically that the legislature should prohibit any person, association or corporation from exercising the privilege of banking or creating paper to circulate as money; yet these provisions were held to mean banks of issue, not banks of deposit or discount.¹ Similar holdings have been made in other states, where bank charters were prohibited or banking laws were required to be submitted to popular vote.² The state of Illinois in its last constitution has insisted upon this species of *referendum* as to any law authorizing banking corporations, whether of deposit or discount or issue, or amendments thereto.³ A prohibitory statute led to a very extraordinary ruling. A statute forbade the establishment in the Territory of Washington of any branch or agency of a corporation whose charter granted it banking privileges. It was seemingly held that a corporation whose charter gave it the power to "draw, accept, indorse, guaranty [*sic*], buy, sell and negotiate drafts and bills of exchange, inland and foreign; to receive coin, money, silver and gold in any form or other [*sic*], and any kind of valuables on deposit at its offices, and make orders for the payment and delivery of the same or an equivalent at any place whatsoever; to buy, sell and dispose of gold and silver, coin and bullion, gold dust, money and securities for money, and to do a general exchange and collection business, and

¹ Martinez v. Hemme Co., 105 Cal. 440; People v. Lowenthal, 93 Ill. 376; Bank v. Fairbanks, 52 Cal. 196. 191; Dearborn v. Bank, 42 Ohio St. 617. In the latter case the corporation was organized for banking business, so far as under the laws of California it could legally exist.

² Pape v. Capital Bank, 20 Kan.

³ Art. 11, sec. 5, Const. of 1870. See also Reed v. People, 125 Ill. 592; Dupee v. Swigert, 127 Ill. 494.

to invest its surplus or unemployed funds," etc., was not a corporation with banking privileges.⁴ This was decided in spite of the fact that the corporation was carrying on a very large banking business in various places. It shows how far the courts will go in trying to avoid a seeming injustice.

§ 5. Construction of charters.—The court, in the case just cited, intimates that under such a charter the association might be exceeding its powers in doing a general banking business. Courts, generally, in construing charters, construe them strictly as against the state, and more liberally where the objection comes in a collateral way. A corporation engaged in loaning its own money upon notes and mortgage security was held not to be a banking corporation.¹ A company investing its profits in loans secured by mortgages would not be engaging in the banking business.² In another case the president of a trust company was being prosecuted as the officer of a bank receiving a deposit knowing his bank to be insolvent. The trust company had been in the habit of receiving deposits of money subject to check. Its charter gave it the power of receiving money in trust and of accumulating the same, and to loan money on real estate and collateral, and to execute and issue notes and debentures, and to buy and sell all kinds of negotiable and

⁴ Wells, Fargo & Co. v. Nor. Pac. Ry. Co., 23 Fed. R. 469, per Deady, Dist. Judge. The case was *mandamus* to compel the defendant railroad to furnish express facilities. The court apparently lost sight of the statute altogether and held that it made no difference that Wells, Fargo & Co. were doing a banking business elsewhere; the test would be whether they were doing such a business in Washington. The statute, however, made the test to consist of the powers granted to the corporation by its

charter, not what business it was actually doing. The case refers to an earlier unreported case of the territorial court.

¹ Oregon, etc. Investment Co. v. Rathburn, 5 Sawy. 32. The court went so far as to assume that the corporation was loaning its own capital. But there was no proof whatever to show that fact. The question arose collaterally.

² Life Ass'n v. Levy, 33 La. Ann. 1203. This case is apparently one of construction of a charter.

non-negotiable paper, stocks and other investment securities. Yet the court held that the president was not criminally liable as the officer of a bank.³ But it is well known that many corporations called trust companies have banking powers, and carry on a general banking business thereunder. Such corporations from any standpoint would necessarily be considered simply as banks, so far as their character as banks was in question. But in *quo warranto* proceedings it was held that a corporation which was given the right to grant evidences of debt to be issued payable on demand would violate its charter by the issuance of evidences of debt payable on demand to circulate as money, where the violation charged was the illegal exercise of banking powers.⁴

§ 6. Under penal and forfeiture statutes.—The strictest rule in favor of the citizen is applied in this class of cases. Courts have gone quite far in verbal refinements in order to mitigate penalties. The cases mentioned in the note below are more properly cases of statutory construction, but they show a very dextrous manipulation of banking statutes.¹ Coupon notes, where the coupons were payable to bearer, were held not to be, when issued, an act of banking.² Negotiable bonds, as the case seems to represent them, issued

³State v. Reed, 125 Mo. 43. The court in its opinion refers to Mer. Bank v. New York, 121 U. S. 138, as holding that a corporation with such powers was not a bank. But the illegality of the act ought not to have been permitted to be set up by the defendant. The case is therefore wrongly decided.

⁴People v. River Raisin Co., 12 Mich. 389. There was a demurrer to the replication. The replication was held bad, but, the plea being bad, judgment went against the defendant. The plea was considered bad because it neither denied nor

confessed and avoided the exercise of banking powers. But the plea did set out just what the corporation was doing under its charter. Hence the opinion, though vague and rambling, must be taken to hold that the charter did not permit the issuance of circulating notes.

¹Bristol v. Barker, Anth. N. P. 235; S. C., 14 Johns. 204; People v. Brewster, 4 Wend. 498. Compare People v. Bartow, 6 Cow. 290; People v. Doty, 80 N. Y. 225.

²Barry v. Merch. Ex. Co., 1 Sandf. Ch. 280.

by a railroad, were governed by the same rule.³ The receipt of money on deposit was considered no violation of a charter prohibiting banking, although it seems that the deposits were treated as bank deposits.⁴ Under a statute making bank stockholders personally liable for the debts of the bank, the stockholders were held not liable for debts arising from a business of negotiating and guaranteeing mortgages.⁵

§ 7. The right of banking.—At common law, the various kinds of banking, whether of issuing notes, discounting paper, or receiving deposits, were the privileges of any one who chose to exercise the right. This would seem to be the necessary conclusion from the development of banking. Originally the relation between a bank and its depositor was not that of debtor and creditor. Some of the greatest of the old European banks received money strictly as a deposit, to return the same money to its owner. But early in the history of banking it came to be a received notion that the relation of debtor and creditor was initiated by a so-called but misnamed deposit. Whether the bank issued to its depositor an evidence of debt in the form of a note or notes, the amount being made payable on demand, or whether the credit was given the customer in his pass book or on the bank book, the obligation was precisely the same, to wit: a debt payable on demand. It therefore seems reasonably certain that banking continued to be at common law a privilege open to all. So the authorities agree.¹

§ 8. When a franchise.—All the courts seem to have recognized that the power to issue notes to circulate as money could be made a franchise.¹ No one ever seems to have questioned the right of the legislature to make the power to issue currency a franchise grantable by the state.

³ Hubbard v. N. Y. R. R. Co., 36 Barb. 286.

⁴ Corwin v. Insurance Co., 14 Ohio, 6.

⁵ Kiggins v. Munday, 19 Wash. 233.

¹ Bank of Augusta v. Earle, 13 Pet. 519, 596; Curtis v. Leavitt, 15 N. Y. 9; Nance v. Hemphill, 1 Ala. 551.

¹ Bank of Augusta v. Earle, *supra*;

Myers v. Irvine, 2 S. & R. 368.

It is put on the ground that the government has the power to protect its subjects from a worthless currency.² If the legislature can take away one branch of banking from private citizens for the public good, it would seem to follow as a matter of strict logical deduction that all branches of the business could be made franchises.³

§ 9. Right of private banking.—Originally banking in all its branches was a common-law privilege, as we have stated. The fearful evils of unrestrained banking in its branch of issuing notes caused the privilege to be curtailed. The New York statute forbade all kinds of private banking, and restricted the right to associations authorized by the state. The power of the legislature to do this was challenged in the case of *Attorney-General v. Utica Ins. Co.*, 15 Johns. 358, in an ingenious argument by T. A. Emmett. But his argument was wholly unsound in his case because he was arguing for a corporation, whose rights and privileges were not those of individuals, but simply what the legislature granted it. The court held that, while banking was a common-law right, it had become a franchise under the statute. This ruling was necessary to the case, which was *quo warranto*. It should be noted that in the New York constitution in force in 1818, when this case was decided, there was no clause against depriving a person of life, liberty or property without due process of law. That was first inserted in the constitution of 1822. The clause in the federal constitution¹ was binding, of course, only on the general government, and the court assumed the power of the legislature by analogy to the action of the English parliament. But this case seems to have settled the law in New York, and the question was not raised under the new constitution. The case of *Bank of Augusta v. Earle*, 13 Pet. 519, admitted the right of the legislature to make issuing notes a franchise, but

² *Myers v. Irvine*, 2 S. & R. 368. 299; *Attorney-General v. Utica Ins.*

³ *State v. Woodmansee*, 1 N. D. Co., 15 John. 358.

246; *State v. Stebbins*, 1 Stew. (Ala.) ¹ Fifth Amendment to the Federal Constitution.

seems to doubt the right to make other branches of banking a franchise. But since the court was dealing with a corporation's rights in that case, the statement would have been *dictum*. The two earlier Alabama cases seem to have assumed the right of the legislature to make all banking a franchise.² The point at last came before the supreme court of North Dakota, and that court, in an opinion not very well considered, held that the state legislature could prohibit all private banking;³ but a little later the supreme court of South Dakota held such an act to be unconstitutional.⁴ Other states will probably settle the question for themselves in the near future. The supreme court of the United States will also be required to pass upon the question under the fourteenth amendment. If that court should decide against the legislative right, the question will be completely settled for the whole United States as to any law subsequent to the fourteenth amendment. But should it hold in favor of the right, it is perfectly possible that some states will, nevertheless, hold that such an act would be repugnant to the state constitution, which decision as to that point would be final for that state.

§ 10. The probable rule.—The objection to such statutes is that they deprive the citizen of a valuable property right, to wit: the right to pursue a lawful calling.¹ It is claimed to be in violation of the due process of law clause of the state and federal constitutions, as well as the privilege and immunity clause of the federal constitution. The sole question is this: Is the evil of unrestricted banking so great that the police power can take it wholly away, or is the legislature

²Nance v. Hemphill, 1 Ala. 551;

State v. Stebbins, 1 Stew. (Ala.) 299.

Chief Justice Taney, in Bank of Augusta v. Earle, says that the case of State v. Stebbins could only be considered as applying to banks of issue.

³State v. Woodmansee, 1 N. Dak. 246.

⁴State v. Scougal, 3 S. Dak. 55.

¹The usual authorities are cited in the cases above noted. For discussions of the general subject, not confined to banking, see 25 Am. Law Rev. 871, and 27 Am. Law Rev. 857.

required, the business not being a nuisance,² to prevent the evil by proper regulation? It is not impossible, it would seem, by requiring the capital stock of a private banker to be paid in, and by providing in some safe way for the double liability of that capital stock, by a deposit of securities to make private banking as safe as corporate banking. But it is apparent that, if this were done, and the private banker required to deposit securities, to make his responsibility equal to the double responsibility of the stockholders of a corporation, the private banker would cease to exist. This is, perhaps, the easiest way for a legislature to accomplish indirectly such a result, if it is so desired. The objection of class legislation, and of a discrimination against the private banker, would need to be met and overcome; but it could be said that the law, applying to all private bankers-alike, could not be class legislation. If the legislation attacked consists, however, of a positive prohibition against private bankers, the constitutional question must be fairly met. It is likely that the decision will depend upon the private views of the members of the court upon the proper system of political philosophy. If they are devotees of the *laissez faire* doctrine of government, they will adopt the rule of non-prohibition. If, however, they belong to the opposing school of political thought, they will follow the opposite rule, for the question belongs far more to politics than it does to law. It will require a very accurate knowledge of the general opinions of the judges composing a court of appeal to form any conjecture as to the probable decision. We are likely to have much judicial exposition upon this question in the near future.³

² Attorney-General v. Bank of Niagara, 1 Hopk. Ch. 403; Attorney-General v. Insurance Co., 2 Johns. Ch. 371. Both these cases held that an injunction would not lie at the suit of the state against the unlawful exercise of banking privileges.

³ The flow of judicial rhetoric, which is not always in the best

literary taste, has already begun. "Whence, then," the justice writing the opinion in *State v. Scougal*, *supra*, indignantly exclaims, "did the legislature of this state derive its power to farm out these privileges to corporations, and to deny to individual citizens the right to exercise them, which he and his

§ 11. **Question considered on principle.**—It may be conceded that to take away the business of a private banker, who has for many years carried on a lucrative and honorable business, seems a wholly unwarranted proceeding. Everything that can be urged in favor of the citizen's right to enjoy property can be urged in his favor. But many other kinds of business have been treated in this way, and the step justified by an appeal to the right of the public as against the individual. It is claimed with some reason that the history of private banking shows no more failures than corporate banking; that the worst of bank failures have been those of corporations. But it seems plain that if the right be conceded to the legislature to prohibit private banks of issue, the right to prohibit private banks of deposit necessarily follows. We have shown that both businesses are at common law the rights of the citizen. The issuance of a note payable on demand in the place of a sum of money deposited or borrowed does not differ in the least from a book account payable on demand for a sum deposited. In fact the issuing of the note is the older banking transaction. It is true that the note can circulate as money, and the book account cannot. But certificates of deposit and savings books can so circulate in theory, although the form of the latter is too cumbrous for practical use, and the courts deny to them negotiability. Yet the currency does not become demoralized as long as the banker's credit is perfect. If a bank of issue fails, the notes become, of course, practically worthless,

ancestors have from time immemorial possessed?" This is a somewhat clumsy sentence, but if it is meant to assert that we and our ancestors from time immemorial have enjoyed the right to have a bank, the learned justice is only making a phrase. It cannot be asserted that from time immemorial our ancestors have reveled in the unrestrained right of private note issues. That is a compara-

tively recent thing. See *Anderson v. Alexander*, 7 Am. Law Reg. 173. The question is one to be considered calmly and without the aid of buncombe, which never shows in a worse light than in the permanence of a judicial opinion. The opinion seems to think that the federal constitution made note-issuing a franchise, but that is a mistake. It merely prohibited state bills of credit.

unless secured. The same result follows upon a bank failure as to the deposit accounts. Just as much will be paid on the notes as on the deposits. Rather fewer people are affected by the depreciation of the notes than by the depreciation in the value of the deposits, for the deposit account will generally be much larger than the note issue. The direct and indirect effects of a bank failure on its depositors would perhaps be as large as the same effects upon the note holders. So, therefore, no reason can be urged in favor of the legislative right to suppress private banks of issue that cannot also be urged in favor of the right to suppress private banks of deposit. This consideration does not apply to private banks solely of discount. But such a bank cannot in any proper sense of the term be called a bank, as the word is understood either from a business or a politico-economical standpoint. We do not call a note-shaver or a pawn-broker a banker, but both may be discounters of paper. Yet, even pawn-broking, it is conceivable, might be reduced to a franchise for public convenience. But every one must concede as to banks of deposit that people in general know little of a private banker's responsibility, and are prone to accept the fact that a man is a banker as a guaranty of his perfect financial responsibility. That may be their own fault, but it is none the less a fact. Much could be said, however, against the possibility of any man finding out anything from published bank statements. The loans and discounts may be good or bad; the fact can only be ascertained with much trouble. It is found that bank supervisions and examinations do not insure good banking, and that the ultimate guaranty against loss is the double responsibility of stockholders, which can be secured from private bankers only on terms that would lead to the discontinuance of the business. So that the weight of reason is decidedly in favor of the legislative right to suppress private banking.

§ 12. Further questions.—Even if private banking be absolutely prohibited by the state constitution, the question remains whether the state constitution is opposed to the fed-

eral constitution. If the state constitution were older than the fourteenth amendment, it is difficult to see how that provision would apply, and it is not conceivable that under the privilege and immunity clause of the original constitution (art. 4, sec. 2) the question could arise. But even in states with constitutions adopted after the fourteenth amendment was passed, if the act prohibiting private banking were held in consonance with the federal constitution, the question arising under a state constitution requiring banking acts to be submitted to popular vote, and the state court of final resort holding that the act prohibiting private banking was unconstitutional under the state constitution, the further consideration would require decision, whether a popular vote gave the law any efficacy as against the state constitution. Since the constitution is binding upon all the people, it would seem to follow that such a law would be held unconstitutional where a law would be so held if adoption by popular vote were not required.¹ It is possible that the supreme court of the United States might hold, even in the case of a constitution adopted prior to the fourteenth amendment, that an act suppressing private banking was contrary to those fundamental principles of government which are spoken of in *Loan Ass'n v. Topeka*, 20 Wall. 655.

§ 13. Formation of a bank.—Where private banking is lawful and a private bank is started by an individual or individuals, there appear to be no special circumstances requiring notice whether the bank is formed by an individual or a partnership. But one question deserves notice. It seems to have been held that since a partnership can be formed as between the partners on other terms than the joint and several liability of the partners, it follows that the partners will not be jointly and severally liable as to third parties who have notice of the terms of the partnership.¹ It would seem

¹State v. Hastings, 12 Wis. 47, v. Allin, 35 Ill. App. 336; Riggs v. seems to hold otherwise, but is not sound. Swan, 3 Cranch, C. C. 183; Hess v. Werts, 4 S. & R. 356. And see § 209,

¹Hastings v. Hopkinson, 28 Vt. *post*, note 2.
108. *Contra*, Manhattan Brass Co.

to follow, if that be the law, that a partnership limited as to the liability of partners can exist as to persons having notice, even at common law. This result shows the absurdity of the rule. But all the states that permit limited partnerships forbid such a partnership for banking purposes,² with few exceptions.³ There seems to be no question that a limited partnership that fails because of a failure to comply with the statute becomes a general partnership,⁴ or, if the particular partnership be not permitted to be limited, such a partnership, although otherwise formed in accordance with the statute, becomes general.⁵ It is said that a limited partnership formed in a state permitting such a partnership, but in order to do business in another state, would be a general partnership in both states.⁶ But this would appear not to be true as to a limited partnership formed in a foreign country to do business in a state permitting limited partnerships.⁷ The discussion as to the conflict of laws as to limited partnerships is reserved for the subject of "Unauthorized Banking."⁸

§ 14. Joint-stock companies.—In states permitting joint-stock companies to be formed for banking purposes the statute must be strictly followed.¹ If this be not done the joint-stock company is a general partnership.² The rule as to *de facto* corporations cannot be invoked to make a *de facto* joint-stock company.³ If the liability is limited, such joint-stock companies would be generally considered corporations.⁴ If they are to be so considered, the fact would

² See George on Partnership, 424 et seq., for full references to statutes.

³ Expressly permitted in Maryland; by implication in Illinois by not being forbidden.

⁴ Bates on Lim. Part. 49.

⁵ McGehee v. Powell, 8 Ala. 837.

⁶ George on Partnership, 428.

⁷ Jacquin v. Brisson, 11 How. Pr. 385.

⁸ See § 29, *post*.

¹ Maloney v. Bruce, 94 Pa. 249; Elliot v. Himrod, 108 Pa. 569.

² Same cases as in last note.

³ Eliot v. Himrod, *supra*.

⁴ Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566. *Contra*, Curtis v. Leavitt, 17 Barb. 309. See also Bates on Lim. Part., sec. 208 et seq.; Robbins Electric Co. v. Weber, 172 Pa. 635.

have an important bearing upon the conflict of laws as to private banking, which will be noticed later.⁵

§ 15. Corporations.— A corporation can be formed only under authority from the sovereign power. In the divided sovereignty as between the general government and the states, it was early settled¹ that congress had the power to charter a United States bank. A state court has given encouragement to congress by deciding that it had power to pass the national bank act.² The state legislatures have, of course, power to charter banking corporations. This power, in the absence of constitutional restrictions, may be exercised either by a grant of a special charter, a proposition never disputed, or by the passage of a general law permitting the formation of such corporations. But the granting of special charters is now forbidden in almost all the states, and congress has forbidden such a power to the territories. In some of the states the legislature is forbidden to pass any banking law unless the law is ratified by a vote of the people. If the law is passed, it ought not to be amended except by a law ratified by popular vote.³ Under such a provision it is questionable whether additional powers not of a banking character can be given to banks unless the law be referred to the people and adopted by them.⁴

⁵ See § 29, *infra*.

¹ *McCulloch v. Maryland*, 4 Wheat. 316.

² *Pollard v. State*, 65 Ala. 628. See *Farmers' Bank v. Dearing*, 91 U. S. 29.

³ *Porter v. State*, 46 Wis. 375, citing earlier cases. *Contra*, *Smith v. Bryan*, 34 Ill. 364, citing earlier cases. These last decisions have been condemned by the provision in the Illinois constitution of 1870, which applies to amendments.

⁴ The Illinois constitution provides (art. 11, sec. 5) that no act authorizing or creating corporations or associations with banking

powers, whether of issue, deposit or discount, nor amendments thereto, shall be in force unless ratified by a vote of the people. An act ratified by a vote of the people (1 Starr & Curtis, ch. 16a, sec. 4) provides that banking corporations organized under the act shall have power "to accept and execute trusts." An act not so ratified (1 Starr & Curtis, ch. 32, sec. 89 et seq.) authorized all trust companies, and all companies authorized to accept trusts, to be appointed to execute such trusts as assignee or trustee by deed, or executor or guardian or trustee by will; and

§ 16. **State banks of issue.**—It is too plain for argument that a bank note is a bill of credit, and that no state under the federal constitution can issue a bill of credit;¹ yet our federal supreme court has decided that the state may do so by the simple expedient of incorporating a bank with such power.² It is also too plain for argument that, under the same section of the same article of the federal constitution, no state can make anything but gold and silver a legal tender; yet our highest court has practically decided the exact contrary,³ although the opinion says it does not. If the prohibition was to be made effective, a state was enjoined from creating corporations with power to emit bills of credit; yet in the same case the court held that the state might create a corporation with the power to issue its notes as currency.⁴

the statute further contained numerous provisions as to the performance by such companies of their trust duties. This later act, so far as it applies to banks with trust powers, is amendatory of the banking act. The one statute gives the power, the other defines the manner of its execution. As to a banking corporation given trust powers after the constitution of 1870, it seems a palpable evasion to give the bank trust powers by a statute ratified by popular vote, and then to define those powers and the manner of their execution by a statute not so ratified. There is reason in the idea, because the trust operations of a bank might bring upon it liabilities that would destroy the security of the depositors. We may suppose a case where the capital of a bank is \$100,000. This with the statutory liability would make the capital \$200,000. Suppose the bank becomes trustee for claims aggregating a much larger sum. Conceding that the statutory liability would not go to aid the trust

claimants, and also that a deposit is required from trust companies, nevertheless, the trust claims being preferred (see § 235, *post*), the assets would leave perhaps little for the depositors in case a crash came. But as to banks organized before the constitution of 1870 it would have no retroactive application. *Henderson Loan Ass'n v. People*, 163 Ill. 196. Trust companies without banking powers would not come under the provision. *Roane Iron Co. v. Wisconsin Trust Co.*, 74 N. W. R. 818. But as to banks with trust powers, a statute defining the powers ought to have a popular adoption. See the principle of the decision in *Van Steenwyck v. Sackett*, 17 Wis. 645; *Rusk v. Van Nostrand*, 21 Wis. 161.

¹ Art. 1, sec. 10, Fed. Const. See § 311, notes 14 and 15, *post*.

² *Briscoe v. Bank of Commonwealth*, 11 Pet. 257.

³ *Briscoe v. Bank of Commonwealth*, *supra*.

⁴ *Briscoe v. Bank of Commonwealth*, *supra*.

In fact the state gave the bank a franchise to issue bank notes. A franchise is a part of the power of the state given to the corporation. The opinion seemingly concedes that the state could not emit a bill of credit, yet it could give to a corporation part of the power which it did not have. A more perfect *non sequitur* cannot be imagined. Yet this opinion has been acquiesced in ever since;⁵ but the suppres-

⁵The decision was made by a packed court, and overruled *Craig v. Missouri*, 4 Pet. 410, a most powerful decision by Chief Justice Marshall. The case was first argued in 1834, before a court composed of Marshall, Story, Thompson, McLean and Baldwin; Duvall and Johnson were absent. Three of those judges concurred in holding the state bank notes bills of credit, but no decision was pronounced, because the majority was not a majority of the whole court. A reargument was ordered. Marshall and Johnson had died, and Duvall had resigned; Wayne, Taney and P. P. Barbour had taken their places, which made the last three, with McLean and Baldwin, all Jackson's appointees. The reargument was had, and the cause decided in a singularly foolish, inept and futile opinion by Justice McLean. McLean afterwards died in the odor of sanctity because of his action on the slavery question, but this decision ought never to be forgotten. The evils of a worthless paper currency that cursed this country for so many years were all made possible by this reckless political decision. Sumner's *Jackson*, p. 363. The case was argued by Mr. White and Mr. Southard for the plaintiff in error, and by Mr. Hardin and Mr. Clay for the defendant. The really valuable part of Mr. White's argument the reporter has left out. Mr. Southard speaks of the change of the personnel of the court, and the probable change of opinion, and says: "*Misera est servitus, ubi lex aut vaga aut incognita est.*" Judge Story's dissenting opinion, with its splendid eulogy of the great Chief Justice, is a masterpiece. The "wild-cat" banking from 1837 to 1860, and the debauching of the public mind as to paper money, would not have been possible if the opinion of Marshall and Story had prevailed. "Jackson's appointments introduced the mode of action, by the executive, through the selection of judges, on the interpretation of the constitution by the supreme court. Briscoe's case marked the victory of Kentucky relief finance and states-right politics over the judiciary. The effect of political appointments to the bench is always traceable, after two or three years, in the reports, which come to read like a collection of old stump speeches. The climax of the tendency which Jackson inaugurated was reached when the court went to pieces on the *Dred Scott* case, trying to reach a decision which should be politically expedient rather than one which should be legally sound." Sum-

sion of state banks of issue is achieved by the national tax of ten *per centum* upon state bank issues. This power cannot be successfully questioned.⁶

§ 17. *State bank tax.*—The state bank tax of ten per cent. upon the notes issued by all state banks and private bankers is the method by which the national government preserves the country from unrestrained note issues.¹ Our political institutions, even when at their worst, fit us so easily that we rarely stop to consider how narrow is the barrier which separates us from the condition of “wild-cat” banking.² There are many constitutions which prevent a

ner’s Jackson, p. 363. Later instances of this sort could be easily found, but the same result is often obtained through the election of judges. The whole chapter is a fruitful lesson for all lawyers. A case *contra* to the one above is Linn v. State Bank, 1 Scam. 87, where the state court was right. *Briscoe v. Bank* has been affirmed in *Woodruff v. Trapnall*, 10 How. 205; *Darlington v. Bank of Alabama*, 13 How. 12; *Curran v. Arkansas*, 15 How. 817. It has been overthrown in *Veazie Bank v. Fenno*, 8 Wall. 533, by holding that the national government can tax the power out of existence.

⁶ *Veazie Bank v. Fenno*, 8 Wall. 533, holding that such a tax was not a direct tax, but an excise tax.

¹ Statute of Feb. 8, 1875, ch. 36, secs. 19–21; 18 Stat. at Large, 311.

² One of the curious legacies of the days of vicious banks of issue is the idea that the issuance of notes is a source of profit to the banker. This idea really lies at the bottom of the jealousy which exists among a certain class against national banks. So far is it from

being a source of profit that many national banks do not keep their notes in circulation. There is a school of continental economists who think that unrestricted private banking is a good thing—that it regulates itself. See the translation of an article of Adolph Wagner found in 1 *Encyc. Pol. Science*, 239. It is lamentable to see that this idea has some following among bankers, and that a secretary of the treasury has actually proposed to allow banks to issue notes of hand against their assets. The folly of this proposition is that such issues cannot be successfully supervised. A failing bank would always resort to note issues to prevent bankruptcy. The ignorance of legal conditions involved in the suggestion is appalling. But in this country we have seen the effects of such a system, and it is not likely to be revived. See 29 *Am. Law Rev.* 94, 459. Whenever there has been any talk of reviving it, “*Terruit gentes, grave ne rediret Seculum.*”

The effects of such a system are likely to prove incalculably disas-

state bank from issuing notes, or which provide for security; but there are many states wherein there is no provision of law that would prevent a private banker³ from flooding the country with worthless currency in the form of unsecured notes. Until such a provision exists in every part of the United States, it is not too much to say, even in a legal treatise, that an advocate of the repeal of the state bank tax is a public enemy.

§ 18. Delegation of power.—The national legislature has delegated to the different territorial legislatures the power to incorporate banks.¹ In practice, the duty of passing upon due incorporation, both under the national bank act and under state and territorial legislation, is usually delegated to ministerial officers.² No good reason can be urged why jurisdiction ought not to be given to certain courts to pass upon the question of the propriety of the articles of incorporation and the regularity of the steps taken.

§ 19. Formation of corporations.—A corporation may be formed either by the grant of a special charter, where such a course is permissible, or by incorporation under a general law. A bank formed under a special act becomes, by implication, a corporation, although the term is not applied to it in the act.¹ A special authority or franchise given

trous. A case which, when read between the lines, shows the evils of this system is *Cushman v. Carver*, 51 Ill. 509. One banker wrote to another to send him the balance due him at the other banker's in bills of certain kinds. He evidently did not know that some of those bills were likely to depreciate. The other banker, who seems not to have had a fine sense of honor, or perhaps it had become debauched through contact with wild-cat money, gathered a lot of the bills which had depreciated after receipt of the letter and sent

them. The first banker received the package, but let it lie unopened for a week, and it was held he could not recover because it was a great act of negligence to wait one week!

³ A private banker is not a corporation.

¹ *People v. Marshall*, 6 Ill. 672; *Bank of Michigan v. Williams*, 5 Wend. 480. There are a number of other cases to the same effect.

² Such delegation has always been upheld whenever attacked.

¹ *Mahoney v. State Bank*, 4 Ark. 620.

by a charter remains conditional until the requirements of the act are fully carried out.² Where a banking corporation is attempted to be formed under a general law, it is often said that the requirements of the law must be strictly followed. But this is only relatively true. It will appear that objections of this character, as a general rule, can be urged only in favor of the state in a direct proceeding to attack the incorporation.³ The statutes require a name for the corporation and forbid the use of the same name by two corporations,⁴ and a bank whose name is infringed may have the remedy of injunction. The location of the bank must be specified, and it would seem to have been held that one state cannot charter a banking company for the purpose of doing business in another state;⁵ and when located in one county a bank cannot establish a branch of itself in another county without authority from its charter.⁶ An extreme case that worked a great injustice, and cannot be approved, will be found in the note.⁷ In the absence of express statutory authority the corporation cannot begin business, except as a *de facto* corporation, until the whole capital stock is subscribed,⁸ but sometimes the statute permits it.⁹ The statute governs as to how the capital stock shall be paid, whether in money or otherwise.¹⁰ If the statute is silent on the sub-

² Williams v. State, 23 Tex. 264.

³ See § 31, *post*.

⁴ International Trust Co. v. International Loan & Trust Co., 153 Mass. 271; In re Bank of Attica, 12 N. Y. Supp. 648. State banks cannot call themselves national. Sec. 5243, Rev. Stat. U. S.

⁵ Atterbury v. Knox, 4 B. Mon. 90.

⁶ People v. Oakland Co. Bank, 1 Doug. 282. But this defense is not pleadable to the cashier's bond. Morehead Banking Co. v. Tate, 30 S. E. R. 341.

⁷ Armstrong v. Second Nat. Bank, 38 Fed. R. 883. The decision is wrong because it would deny to a

national bank the right to have a clearing agent.

⁸ See 1 Thompson on Corp., sec. 1235.

⁹ Reese v. Bank of Mont. Co., 31 Pa. 78. See Gray v. Portland Bank, 3 Mass. 364.

¹⁰ It seems to be held in an old case that the capital stock must be paid in money (King v. Elliot, 5 Smedes & M. 428), where a creditor of the bank garnished a stockholder for his unpaid subscription. See on the general proposition, Moses v. Ocoee Bank, 1 Lea, 398; Marr v. Bank of West Tennessee, 4 Lea, 578.

ject and the doctrine of payment "in money's worth" is held in the particular jurisdiction, there seems to be no reason why payment for the capital stock should not be made in property, provided such property was proper for use in the business.¹¹ The statutes usually require the issuance of a certificate by proper authority where the organization is made under general laws, which certificate is always evidence of due incorporation, but it will be seen that it is not the only evidence thereof.¹² The effect of the failure to issue a certificate will be noticed in a later chapter.¹³

§ 20. Conversion of state into national banks.—The national bank act gives the right to convert any bank organized under a special act or general law of a state into a national bank upon the certificate of the directors that two-thirds of the stockholders have agreed thereto.¹ This authority is all that is necessary for the conversion of a state into a national bank.² Under another statute, banks in the District of Columbia are authorized to convert themselves into national banks.³ The directors of the state bank continue to act until their successors are elected, and they are not required to take a new oath, but a majority of the old directors is required to perform any corporate act.⁴ If the state bank has voting and non-voting stock, the non-voting stock cannot participate in the voting upon the change of organization,⁵ and the act of the voting stockholders transfers the non-voting stock as well.⁶ The new bank succeeds to all the property of the old bank, and a suit upon an obligation held by the old bank can be brought in the name of the new bank, although a state law provides that the old

¹¹ The Illinois banking act does not require, except by a weak implication, the payment of stock in money. See on the general subject, 2 Thomp. on Corp., sec. 1562 et seq. See also *Pacific Trust Co. v. Dorsey*, 72 Cal. 55.

¹² See § 23, *post*.

¹³ See § 31, *post*.

¹ Sec. 5154, Rev. Stat. U. S. See § 212, *post*.

² *Casey v. Galli*, 94 U. S. 673.

³ Act of Congress June 30, 1876.

⁴ *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308, 11 Am. R. 253.

⁵ *State v. Phoenix Bank*, 34 Conn. 205.

⁶ *State v. Phoenix Bank*, *supra*.

incorporation shall continue to exist for three years for the purpose of prosecuting and defending suits.⁷ Even if the national bank was not in form converted from a state bank; yet, if such was the fact, the new national bank is merely the successor of the former state bank and may hold its assets.⁸

§ 21. Alteration of bank charter.—After a charter has been granted to a bank the charter becomes a contract under well settled rules, and is not subject to amendment by a state legislature, unless the amendment is immaterial or of a remedial character, or unless the power to amend has been reserved.¹ Whether the doctrine of *Munn v. Illinois*, 94 U. S. 113, would be applied to charters of banks not of issue may well be doubted. The charter could not be repealed except by authority reserved or by virtue of the police power; but that subject belongs to a treatise on constitutional law or corporations and not especially to a work of this nature.²

§ 22. Power as to by-laws.—The power of a banking corporation to enact by-laws, whether the right is granted by the charter or is used as an inherent power, does not differ from the rules in regard thereto governing other corpora-

⁷ *Atlantic Bank v. Harris*, 118 Mass. 147.

⁸ *Western Res. Bank v. McIntire*, 40 Ohio St. 528.

¹ See 2 Cook on Corp., sec. 492 et seq.; 1 Thompson on Corp., secs. 66-105; 4 Thompson on Corp., sec. 5380. See also *Wheeler v. Frontier Bank*, 23 Me. 303; *In re Reciprocity Bank*, 22 N. Y. 9; *In re Oliver Lee Bank*, 21 N. Y. 9. Compare *United States Trust Co. v. Fire Ins. Co.*, 18 N. Y. 199; *Lowry v. Inman*, 46 N. Y. 119; *Marr v. Bank*, 4 Lea, 578; *Owen v. Purdy*, 12 Ohio St. 73; *Sherman v. Smith*, 1 Black, 587. A charter was altered to impose a stockholder's liability. *Hirshfield*

v. Bopp, 50 N. Y. Supp. 676. And it applies to debts thereafter incurred. *Barnes v. Arnold*, 51 N. Y. Supp. 1109. A by-law that requires the consent of the directors to a transfer of the stock is void. *McNulta v. Corn Belt Bank*, 164 Ill. 427.

² One case holds squarely that a bank is a corporation charged with public duties (*Mechanics' Bank v. Debolt*, 1 Ohio St. 591; reversed, 18 How. 380); but it can choose its depositors (*Thacher v. State Bank*, 5 Sandf. 121), and its charter is a contract. See *Planters' Bank v. Sharp*, 6 How. 301; *Claghorn v. Cullen*, 13 Pa. 133; *People v. Manhattan Co.*, 9 Wend. 351.

tions.¹ But certain implied limitations arise from the charter or general law. A national bank which is forbidden by law from loaning on the security of its own shares cannot create a lien in its own favor upon the shares of its stockholders.² The same rule applies to state banks similarly restricted.³ The passage of such a law repeals a by-law creating the lien, although the by-law was legal when made.⁴ The rules governing the relations of depositors to a savings bank as affected by the by-laws of the bank will be found discussed under a later chapter on Savings Banks.⁵

§ 23. Proof of corporate existence.—The corporate existence may come directly in question or indirectly. It comes directly in question when a suit is brought by the state to forfeit the charter. In such case, nothing being presumed against the state, the proof of the performance of every act required, whether by the special charter or general law, must be strictly made. None of the decisions which follow applies to such a case. But when the due incorporation of a bank comes collaterally in question a very different rule applies. As to a shareholder or officer of the corporation, or as to any one who has contracted with the corporation as such, the fact of due incorporation is conclusively presumed.¹ Even in a criminal case the defendant could not urge the non-existence of the bank, where he had performed acts as president thereof.² When collaterally attacked the existence of the corporation may be proved in favor of the corporation by the certificate of proper authority, and this certificate is conclusive.³ It may also be proved

¹ See 1 Thompson on Corp., secs. 935-1053.

² Bullard v. Bank, 18 Wall. 589, overruling a number of cases. See § 54, *post*.

³ Nicolle Nat. Bank v. City Bank, 38 Minn. 85.

⁴ See Nicolle Nat. Bank v. City Bank, *supra*.

⁵ See § 234, *post*.

¹ Casey v. Galli, 94 U. S. 673, citing a number of cases. Indiana permits a bill in equity by a stockholder against the corporation, in order to test the due incorporation. Albert v. State, 65 Ind. 413.

² In re Van Campen, 2 Ben. 419; Fed. Cas. No. 16,885.

³ Casey v. Galli, 94 U. S. 673; Keyser v. Hitz, 2 Mackey, 473;

either by the special charter or a general law authorizing the incorporation with proof of user, under the charter.⁴ Even if the charter is conditional, the proof of user is sufficient proof of the performance of the condition.⁵ If a double certificate is required, for instance, one by the county clerk and another by the secretary of state, proof of the first certificate with evidence of the transaction of business as a corporation is sufficient.⁶ Parol proof that the bank was actually in existence by doing acts of business,⁷ or was generally reputed to be a bank,⁸ has been held sufficient proof in favor of the bank. Where proof of due incorporation is made by a grant of a charter, it is not necessary to show that the bank commenced business.⁹ But it may be that the general law or the charter forbids the doing of business by the bank until some certain act or acts have been done. If proof were offered that such an act had not been performed, where the objection is made by a third party as against the bank, it would seem that the person who had contracted with the bank, or a shareholder or officer who had acted in the corporation, would nevertheless be held responsible to the association.¹⁰ But if the objection be made by the corporation

Thacker v. West River Bank, 19 Mich. 196. It seems to be intimated that if proof were made that the law did not authorize the granting of the certificate in such a case, the proof would not be sufficient, in *Agnew v. Bank of Gettysburg*, 2 Har. & G. 478. On principle the certificate would be sufficient, even if obtained by fraud.

⁴ *Henderson v. Union Bank*, 6 Smedes & M. 314; *Farmers', etc. Bank v. Jenks*, 7 Met. (Mass.) 592; *Bank of Manchester v. Allen*, 11 Vt. 302.

⁵ *Williams v. Union Bank*, 21 Tenn. 339.

⁶ *Leonardsville Bank v. Willard*, 25 N. Y. 574.

⁷ *Way v. Butterworth*, 106 Mass. 75; *Farmers', etc. Bank v. William-son*, 61 Mo. 259; *Yakima Nat. Bank v. Knipe*, 6 Wash. 348.

⁸ *State v. Fitzsimmons*, 30 Mo. 236. Under a statute see the same case and *Jennings v. People*, 8 Mich. 81. Proof is sometimes dispensed with by statute, unless the incorporation be denied under oath. It seems that a different rule than that stated in the text was laid down in *United States Bank v. Stearns*, 15 Wend. 314, as to the *United States Bank*.

⁹ *People v. Peabody*, 25 Wend. 472.

¹⁰ *Berkshire v. Evans*, 4 Leigh, 223. And see § 32, *post*.

as against a third party, there is some confusion in the decisions. In the case of national banks it is settled that the proof would be good.¹¹ This subject is, however, more properly a part of the discussion upon Unauthorized Banking.¹²

§ 24. Power under charters as to branches.— If the law or the charter of a bank prohibits the establishment of branches, it of course cannot do so; but if the law of the state prohibits branches of a bank, whether of the state or a foreign bank, and the penalty provided is a forfeiture of the charter, it is inoperative as to foreign banks.¹ If private banking is permitted, there is no reason, in the absence of legal prohibition, why a private bank should not have branches; but a corporation has only the powers granted it, and it cannot establish branches unless the power to do so is granted to it.² If the law permits it and branches are established, whether the branch bank is a separate or the same corporation depends wholly upon the effect to be given to the provisions of the statute.³ A bank may do business anywhere unless prohibited,⁴ but it cannot change its place of location.⁵

§ 25. Conflict of national and state laws.— A corporation chartered as a bank by the national government cannot be controlled in any way by state laws in the exercise of the rights granted by congress.¹ It is wholly exempt from

¹¹ McCormick v. Market Nat. Bank 165 U. S. 538; but in this case there was no proof of user or of doing business beyond the contract sued upon.

¹² See § 33, *post*.

¹ Bowman v. Cecil Bank, 3 Grant Cas. 33.

² People v. Oakland Co. Bank, 1 Doug. 282. See Atterbury v. Knox, 4 B. Mon. 90.

³ State v. Ashley, 1 Ark. 513; Elliot v. Branch Bank, 4 Ark. 424; Bower v. State, 5 Ark. 234; Farmers' Bank v. Calk, 4 Ky. Law R. 617; Union Bank v. Denere, 17 La.

234; Trezevant v. Bank of Tennessee, 1 Rob. (La.) 465; Branch Bank v. Rhew, 37 Miss. 110; Bank v. Smith, 33 Mo. 364; Merchants' Bank v. Farmer, 43 Mo. 214; Bank v. Goddard, 5 Mason, 366; Fed. Cas. No. 917; Mason v. Farmers' Bank, 12 Leigh, 84.

⁴ Bank of Augusta v. Earle, 13 Pet. 588.

⁵ Ex parte Schollenberger, 96 U. S. 369. A state statute as to service upon foreign corporations gives the same right of service to United States courts.

¹ Farmers' Nat. Bank v. Dearing,

state control or state taxation, except as to the taxing of its real estate or the shares of individual stockholders, or as such right is granted by congress.² Congress may grant to the states the right to tax such banks.³ Congress has granted to the states the right to tax the shares of individual stockholders and the right to tax the real estate of the bank. The power granted is limited by the two restrictions, first, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens; and second, that the shares of non-residents shall be taxed in the city or town where the bank is located and not elsewhere.⁴ Under this law the bank may be required to pay the tax on its shares and charge the same against its stockholders,⁵ even though state banks are not required to do the same thing for their shareholders.⁶ A deduction allowed from some moneyed capital, but not apparently directed against national banks, is not an unlawful discrimination.⁷ The release from taxation of certain kinds of moneyed capital in the hands of individual citizens is an unfair discrimination only when the particular kind of moneyed capital exempted comes into competition with that of national banks.⁸ A discrimination among national banks is permissible where the discrimination affects all banks, state and national alike, and is not directed against national banks as such.⁹ A state cannot tax the franchises or intan-

91 U. S. 29; *National Bank v. Commonwealth*, 9 Wall. 353; *Railroad Co. v. Peniston*, 18 Wall. 5; *Doty v. First Nat. Bank*, 3 N. Dak. 9; *Pittsburgh v. First Nat. Bank*, 55 Pa. 45. The limitation is suggested that the control may be good if it does not impair the efficiency of the national banks in *Thomas v. Farmers' Bank*, 46 Md. 43. Compare *In re Braden*, 165 Pa. 184; *Newman v. Wait*, 46 Vt. 689.

² Cases cited in preceding note.

³ *Van Allen v. Assessors*, 3 Wall. 573.

⁴ Sec 5219, Rev. Stat. U. S.

⁵ *Aberdeen Bank v. Chehalis Co.*, 166 U. S. 440; *National Bank v. Commonwealth*, 9 Wall. 353.

⁶ *Merchants' Nat. Bank v. Pennsylvania*, 167 U. S. 461.

⁷ *First Nat. Bank v. Ayers*, 160 U. S. 660. State banks were treated as were national banks.

⁸ *Aberdeen Bank v. Chehalis Co.*, *supra*; *Nat. Bank of Commerce v. Seattle*, 166 U. S. 463.

⁹ *Merchants' Nat. Bank v. Pennsylvania*, *supra*. The meaning and purpose of the statute and the dis-

gible property of the national banks, and a tax upon the corporation or its property is not the legal equivalent of a tax on the shares of stock in the names of shareholders.¹⁰

crimination prohibited will be found clearly stated by Matthews, J., in *Mercantile Bank v. New York*, 121 U. S. 138. The object of the statute is stated to be the prevention of the state from levying "a tax on such shares to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying

on a similar business' and operations and investments of a like character." In other words, the phrase "moneyed capital" in the statute by construction becomes "moneyed capital engaged in banking."

¹⁰ *Owensboro Bank v. Owensboro*, 173 U. S. 636, reviewing former cases.

CHAPTER II.

UNAUTHORIZED BANKING.

§ 26. **Scope of the subject.**—The act of banking may be unauthorized for the reason that it is done by a person or corporation prohibited from doing the act. A private person, or a partnership of private persons, may be forbidden to carry on a banking business. A limited partnership may be forbidden from carrying on a banking business in a particular locality. In either case the act may be forbidden in one locality and may be lawful in another. A corporation may do unauthorized banking either because the act is forbidden by law, or because the corporation is not properly formed, or formed under an unconstitutional law, or because the act is beyond the powers granted to the corporation. The results of such acts of banking have a twofold aspect—one with reference to the civil liability, the other with reference to a criminal liability. The results of the act from a civil standpoint will vary with reference to the party by whom the objection is made. The act done as a corporate act may render the doers thereof personally liable in a civil action, or may expose them to a criminal prosecution. Difficulties may arise as the varying effect of diverse laws of different states. The subject is one full of difficulty, and it requires careful discrimination.

§ 27. **Private banking unauthorized.**—Confining ourselves to a particular locality, without reference to the question of conflict of laws, if an act of private banking is absolutely forbidden by a legal prohibition, which contains the assumption that the legislative or other prohibition is held to be lawful, it follows that, if the persons doing the act of private banking are equally culpable, no civil obligation

whatever can arise to perform the contract.¹ The rule of law would be the one applied to any other illegal transaction. But while the courts will not enforce an executory illegal contract; nevertheless, where one party has received a benefit which he ought not in justice to retain, as where the parties are not *in pari delicto*, an action to recover that goes in disaffirmance of the contract will be sustained,² although if the parties are equally culpable no recovery can be had.³ If a fraud was practiced by one party to obtain the benefit, the other party may recover;⁴ or if the fact that causes the illegality were not known to the party who has parted with money or property on the faith of a contract, he may recover.⁵ Some courts have held that, where the prohibited act was simply *malum prohibitum*, and not *malum in se*, and prohibited private banking is such an act,⁶ a recovery may be had, provided a suit disaffirming the contract be brought while it remains executory.⁷ But after a default has been made on the contract, or after a breach of the contract, where the same amounts to a discharge,⁸ no recovery can be had, unless the parties were not *in pari delicto*.⁹ Parties are not *in pari delicto* where a penalty is imposed upon the one and not upon the other;¹⁰ and as pro-

¹ Walker v. United States, 106 U. S. 413; Hanauer v. Doane, 12 Wall, 342; Hunt v. Knickerbocker, 5 Johns 327; Hamtramck v. Selden, 12 Grat. 28; Craig v. Missouri, 4 Pet. 410. And see § 312, *post*, notes 11 and 12, for the general principle.

² See note 7 to this section.

³ Tracy v. Tallmage, 14 N. Y. 162.

⁴ Catts v. Phalen, 2 How. 376.

⁵ Hentig v. Staniforth, 5 M. & S. 122; Northern Bank v. Zipp, 28 Ill. 180; City Bank v. Perkins, 4 Bosw. 420.

⁶ State v. Williams, 8 Tex. 255. This distinction, however, between acts *prohibita* and acts *mala in se* is not sound from any rational standpoint.

⁷ Keener on Quasi-Contract, 259; Utica Ins. Co. v. Kip, 8 Cow. 20; White v. Franklin Bank, 22 Pick. 181. If the business for which a corporation is formed is illegal, the corporators may be sued as partners. McGrew v. Produce Ex., 85 Tenn. 572.

⁸ Clark on Contracts, 643 et seq.; Anson on Contracts, 349.

⁹ Keener on Quasi-Contract, 274; Tracy v. Tallmage, 14 N. Y. 162; Thomas v. Richmond, 12 Wall. 349.

¹⁰ Keener on Quasi-Contract, 274. But where the penalty is imposed on both parties, they are *in pari delicto*. Thomas v. Richmond, *supra*. For cases where the parties were held not to be *in pari*

hibited private banking is usually accompanied with a penalty upon the banker, this fact will generally be a controlling consideration¹¹ where the banker is sued.

§ 28. Unauthorized partnerships or companies.—The effect of the formation of a limited partnership, where the same is made for a business not permitted by statute, is to make the parties liable as general partners.¹ The same rule would apply to unauthorized joint-stock companies,² with the limitation already pointed out, that in some jurisdictions the joint-stock company might be held to be a corporation.³ But the latter question would not arise except in another state, and the courts of such a state would probably apply the law of the place of formation of the joint-stock company.

§ 29. Conflict of laws as to private banking.—The general rule as to contracts is that the law of the place where the contract is entered into governs the contract, unless it was to be performed in another place, when the law of the latter place would govern.¹ The remedy is controlled by the law of the locality where the remedy is sought.² If a

delicto, see *Brown v. Killian*, 11 Ind. 449; *Buffalo Bank v. Codd*, 25 N. Y. 163.

¹¹ Even though the act should be illegal as a banking transaction because absolutely forbidden by law, yet if a private banker should, as a banker, make a loan by discounting paper, or by purchasing paper at a discount, there would be no illegality in the loan itself, and hence a recovery would probably be permitted of the amount actually loaned, unless the statute provided that the loan itself should not be recovered. The same rule would apply against the banker as to deposits. As to paper deposited for collection, the effect would be not to destroy the paper; the banker

would get no title. See *Albert v. Bank*, 2 Md. 159, which holds that a third party may set up want of title resulting in this way—a very questionable ruling.

¹ *McGehee v. Powell*, 8 Ala. 827.

² *Maloney v. Bruce*, 94 Pa. 249; *Eliot v. Himrod*, 108 Pa. 569.

³ *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566.

¹ *Rosenberg v. Block*, 50 N. Y. Super. Ct. 357; *Jacquin v. Brisson*, 11 How. Pr. 385; *Hogg v. Orgill*, 34 Pa. 344; *Gray v. Gibson*, 6 Mich. 300; *Lawrence v. Batchellor*, 131 Mass. 504. *Contra, semble*, *Pennington v. Townsend*, 7 Wend. 276.

² Cases cited in preceding and next note.

contract be illegal where it is agreed to be performed or where made, if it is to be performed where made, it is illegal everywhere.³ But if it is legal under the law to be applied as governing its performance, even if prohibited where the remedy be sought, it yet seems that it would be enforced unless the citizens of the state where the remedy is sought would be injured or unless a pernicious example would be set.⁴ The application of these principles to prohibited private banking, or to prohibited limited partnerships or joint-stock companies for banking, would seem to be as follows: If a private banker makes a contract in a state where private banking is prohibited, and the contract is to be performed in that state, it would not be enforced in any other state; but if such a contract was to be performed in a state where private banking was legal, it would be enforced not only in any other state, but even in the state where it was made. If the contract was made to be performed in a state where private banking was illegal, it would not be enforced in any state, even in those recognizing private banking. The same considerations apply to partnerships, general or limited, and to joint-stock companies which are not corporations. But where a limited partnership or a joint-stock company is formed in a state where the formation of the same is legal, the courts of another state would apply the rules of law in force in the state where the firm was located in determining the duties, powers and liabilities of the partners under the contract of partnership or joint association. Yet if the firm was formed in one state to do business in another state, where limited partnerships or joint-stock companies were not permitted, it would become a general partnership everywhere. These results are based on the assumption that such limited partnerships or joint-stock associations are not *mala in se*.⁵

³ McAllister v. Smith, 17 Ill. 328; Titus v. Scantling, 4 Blackf. 89; Rezner v. Hatch, 2 Handy, 42.

⁴ Greenwood v. Curtis, 6 Mass. 358.

⁵ With the cases cited in the notes to this section it will be necessary to compare Barrows v. Downs, 9 R. I. 446; King v. Sarria, 69 N. Y. 32, 34; Trasher v. Everhardt, 3 Gill

§ 30. Corporations formed under unconstitutional law.

An unconstitutional law is really a contradiction in terms; a more correct phrase is an attempt to pass an unconstitutional enactment. The unconstitutionality may arise from various reasons, such as a failure to observe constitutional forms, a subject which is not germane to this work. Such a law is no law at all. It follows logically that a corporation formed under an unconstitutional enactment is not a corporation either *de jure* or *de facto*, because a *de facto* corporation can only exist under circumstances where a *de jure* corporation could be formed. It follows then that the corporate acts of such a corporation are absolutely void as corporate acts. So the authorities hold.¹ But there would seem to be no reason why the incorporators could not both sue and be sued as partners, unless private banking were prohibited; but even then recovery might be had in *quasi-contract* on the ground that the fact causing the unconstitutionality was not known at the time, or that the parties were not *in pari delicto*. Yet this latter proposition is impliedly denied in *State v. How*, 1 Mich. 512, which cannot be considered an authority on account of the fact that the point is not suggested to the court, and because the case was a bill in equity to enforce the contract, not an action in *quasi-contract* in disaffirmance of the contract.²

& J. 234; *Phinney v. Baldwin*, 16 Ill. 108; *Commonwealth v. Bassford*, 6 Hill, 526; *Madrado v. Wells*, 3 Barn. & Ald. 353; *McIntyre v. Parks*, 3 Met. 207.

¹ *Hurlbut v. Britain*, 2 Doug. 191; *State v. How*, 1 Mich. 512; *Nesmith v. Sheldon*, 4 McLean, 375, Fed. Cas. No. 10,125. Compare *Smith v. Barstow*, 2 Doug. 155, where the court enforced a contract whose sole consideration was illegal and void debts. But it is held that a debtor cannot set up this defense. *Snyder v. State Bank*,

1 Ill. 161. This ruling is extraordinary.

² The law was held unconstitutional by a queer vagary of the judicial intellect in *Green v. Graves*, 1 Doug. 351, disapproving *Thomas v. Dakin*, 22 Wend. 76, and *Falconer v. Campbell*, 2 McLean, 195. It followed necessarily that the corporate acts, as corporate acts, were nullities. And in *State v. How*, *supra*, it was correctly held that they were nullities, and that the unconstitutional act could not be appealed to in order to create

§ 31. **De facto corporations.**—By a curative act the legislature, if otherwise empowered to pass the act, can cure a defective organization and thus remove all question of the validity of past as well as future acts of the corporation.¹ Such an act would not be special legislation.² But whenever defects in the organization of a corporation exist, and the objection is urged in a collateral way by a person who has contracted with the bank, or is urged by the bank in order to escape liability, careful discrimination is necessary to ascertain whether the defect is something which is made a condition precedent to the organization of the corporation, without which it is provided by law that no business shall be done, or whether the defect is one which is made a step in the method of incorporation. The first condition will be examined in the next section; but as to any other kind of an act required by law to be performed by the incorporators, the rule is that advantage of it can be taken only in a direct proceeding against the corporation in favor of the state. No other party has the right to set up the objection in a collateral way, neither one who has contracted with the corporation nor one who has participated in it.³ Nor can the corporation set up such a defect in order to escape liability.⁴ The very statement of the proposition involves the

any liability against the corporations as individuals. Since the suit was brought upon the contracts of the bank, that disposed of the case. Then it was held that the association, being a private association for banking (bank of issue), the notes were illegal and void by reason of the positive prohibition of the statute against private banks of issue, citing *Pennington v. Townsend*, 7 Wend. 276; *Bank of U. S. v. Osborn*, 2 Pet. 527. But no attempt was made to recover in *quasi-contract* on the ground that the fact of unconstitutionality was unknown, or that the parties were

not *in pari delicto* because a penalty was attached to the persons doing private banking. Had this been done, a most iniquitous result would have been avoided.

¹*People v. Perrin*, 56 Cal. 345. But see *Sykes v. People*, 132 Ill. 32.

²*Syracuse Bank v. Davis*, 16 Barb. 188.

³*Bank of Port Jervis v. Darling*, 91 Hun, 236; *Pine River Bank v. Hodson*, 46 N. H. 114; *Kellogg v. Douglas Co. Bank*, 58 Kan. 43.

⁴*McDougald v. Bellamy*, 18 Ga. 411; *Bartholomew v. Bentley*, 1 Ohio St. 37.

assumption that if the defective step in the organization had been properly taken, a *de jure* corporation would have resulted; in fact, as against every party but the state, such a corporation is *de jure*.

§ 32. Statutory prohibitions.—But where the act required to be performed is a condition precedent, without which the bank is enjoined from doing any business, the failure to perform the act is fatal, whether urged in favor of the bank or against it.¹ The same rule applies where the law expressly says that the corporation shall not exist without the performance of a certain act or shall not do a certain act. The remedy of the person injured in such a case can only be to disregard the alleged corporation, and in case of a contract bring an action of deceit against the corporators,² or on their warranty of authority as agents,³ or for both contracts and torts hold the corporators liable as partners.⁴ The right to recover in such a case would depend upon the fact whether the person suing was an active participant in a violation of the statute,⁵ or had knowledge of facts that put him upon inquiry as to the illegality;⁶ in other words, whether he was *in pari delicto*. The same rules govern as to violations of positive provisions of law in case of the organization of corporations, or of the acts of corporations positively forbidden by law, that would govern any other illegal transaction, a subject which has been already noticed.⁷

¹ McCormick v. Market National Bank, 165 U. S. 538; Utica Ins. Co. v. Scott, 19 Johns. 1; Attorney-General v. Life Ins. Co., 9 Paige, 470; Myers v. Manhattan Bank, 26 Ohio, 283; Medill v. Collier, 16 Ohio St. 599; Armstrong v. Second Nat. Bank, 38 Fed. R. 888.

² Trowbridge v. Scudder, 11 Cush. 83, and cases cited.

³ Seeberger v. McCormick, 178 Ill. 404, 73 Ill. App. 87, where the court

says that the liability as partners cannot exist where a corporation actually comes into existence.

⁴ See § 35, *infra*, and Empire Mills v. Allston Grocery Co., 15 S. W. R. 505; McGrew v. Produce Ex., 35 Tenn. 572.

⁵ Davidson v. Lanier, 4 Wall. 447; Thomas v. Richmond, 12 Wall. 349.

⁶ Attorney-General v. Life Ins. Co., 9 Paige, 470.

⁷ See § 27, *ante*, and Brown v. Kil-

§ 33. **Ultra vires acts.**—The words *ultra vires* have been unfortunately used to describe very different things, and in consequence great confusion in the law has resulted. It means beyond the powers, and when applied to a corporation means beyond the powers of the corporation. But an act may be beyond the powers of a corporation because it is forbidden by an express rule of the statute or common law, and it would be beyond the powers of any corporation or individual to which the rule of the statute or the common law was applicable. The reason why the act is illegal is not because the power is not granted to the corporation, but because the act is positively and expressly forbidden. Thus, where an act is expressly forbidden by a statute, or is contrary to the rules of the common law, the transaction is illegal, just as any transaction in violation of statute law or the rules of public policy is illegal. Such a transaction is erroneously called *ultra vires*.¹ The courts persist in applying this phrase to such a transaction, and the capital sinner in this respect is unfortunately the Supreme Court of the United States. It is admitted that such a transaction cannot be made the basis of any express contract rights against the corporation or in favor of the corporation,² but

lian, 11 Ind. 449; Buffalo Bank v. Codd, 25 N. Y. 163. And see § 312, *post*, notes 11 and 12.

¹See McCormick v. Market National Bank, 165 U. S. 538, where the act done was expressly forbidden by a statute; Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, where the act done was in violation of an express rule of the common law; Thomas v. Railroad Co., 101 U. S. 71, which shows an act forbidden by the express rules of the common law. In such cases the agreement, being illegal, cannot be made the basis of an action on the contract; but, at the same time, if, under such a contract, as pointed out under § 27, *ante*, the corpora-

tion has received a benefit, or has conferred a benefit upon another, either the corporation or that other person, as the case may be, must respond in *quasi-contract*. But in the cases above the futile attempts made by the court to discriminate cases would have been unnecessary if it had observed the distinctions pointed out in the text above. The law will generally be found to be much more reasonable than the reasoning of courts upon it. A man can often see a just conclusion without being able to give a good reason for it.

²The text expressly applies to contract rights. Otherwise it would be incorrect, because a corporation

at the same time the act of the corporation may make it liable for a tort done in carrying on the corporation's business. Such is one mistaken meaning given to the words *ultra vires*. Its true meaning is an act beyond the powers of a corporation, because the act is not within the corporate power, such a power not being granted to the corporation, although the act is innocent in itself. The reason for not enforcing such an act is merely one for the protection of the corporation or the state. But if it be for the interest of the corporation to enforce it, or if it would be unjust to other persons not to do so, the corporation in the first case, and the state in either case, can feel no necessity for opposing a mere rule of convenience against the manifest dictates of justice. In the case of acts expressly contrary to law this consideration does not apply, because the statute or rule of law is general, and no court could make itself a party to the enforcement of such an agreement without abdicating its function of administering the law. Therefore as to the latter kind of acts it is properly said that they cannot be made the basis of an estoppel on behalf of or against the corporation, where such an estoppel goes in affirmation of the contract.³ But the other kind of an act, which is purely *ultra vires* or beyond the corporate power, but otherwise innocent, may become the basis of contract rights both in favor of and against the corporation.⁴ In

is responsible for its torts. *National Bank v. Graham*, 100 U. S. 699; *Salt Lake City v. Hollister*, 118 U. S. 256. But *Weekler v. First Nat. Bank*, 42 Md. 581, holds different language. See § 120, note 9, *post*.

³ *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24, 55 et seq. But all the cases recognize the right to recover in *quasi-contract*, on a *quantum meruit*, or for money had and received. See *White v. Franklin Bank*, 39 Mass. 181; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490. Some cases which seem exceptions are

not really so. Thus, a forbidden loan to a director may be recovered in a suit on the note. But the note is treated simply as evidence of the loan. And the law being for the protection of the bank, it is not *in pari delicto* with the person who wrongfully obtained the loan, and a recovery is permitted under the rule in § 27, *ante*.

⁴ *Union Trust Co. v. Illinois Midland Co.*, 117 U. S. 434; *Bank v. Matthews*, 98 U. S. 621; *Volz v. National Bank*, 158 Ill. 532; *Anderson v. First Nat. Bank*, 67 N. W. R.

any case a recovery may be had in *quasi*-contract, where the contract has been even fully performed on one side,⁵ and even though there be nothing to show that the parties were not equally culpable.⁶ Herein the rule applied to the suit on a contract merely *ultra vires*, but otherwise innocent, differs *toto coelo* from a suit upon a contract positively illegal. In the last section it appeared that the latter kind of a contract would not be enforced, but *quasi*-contract lay for a benefit that would be wrongly retained, provided the parties were not *in pari delicto*. But as to a contract purely *ultra vires*, the contract itself may be enforced, where the result of its non-enforcement will be to perpetrate a legal wrong.⁷ This matter is of the greatest importance in questions of ratification, and here too a distinction must be made. If the agent's act, which is sometimes also called *ultra vires* because it is not within the scope of the agent's authority, is within the power of the corporation, the corporation may always ratify it. But if the act is one not within the agent's authority because it is denied to the corporation by reason of the fact that it is contrary to an express rule of law, such an act cannot of course be ratified so as to create a contract. If the act be purely *ultra vires*

821; First Nat. Bank v. Smith, 65 N. W. R. 437; Ayres Co. v. Dorsey Co., 70 N. W. R. 111; Town Council v. Union Nat. Bank, 22 S. R. 291; Cameron v. First Nat. Bank, 34 S. W. R. 178; Utica Ins. Co. v. Scott, 19 Johns. 1; Barrow v. Bank of La., 2 La. Ann. 453; Mt. Vernon Bank v. Porter, 52 Mo. App. 244; Sioux Falls Bank v. First Nat. Bank, 6 Dak. 113; Northern Bank v. Zipp, 28 Ill. 180; Foster v. Essex Bank, 17 Mass. 479; Safford v. Wyckoff, 4 Hill, 472; Tootle v. First Nat. Bank, 6 Wash. 181; Smith v. Philadelphia Bank, 34 Leg. Int. 86; Williams v. American Nat. Bank, 85 Fed. R. 376.

⁵ Pittsburgh Ry. Co. v. Keokuk

Bridge, 131 U. S. 371, 389; Whitney Arms Co. v. Barlow, 63 N. Y. 62; Pratt v. Short, 79 N. Y. 437; Ward v. Johnson, 95 Ill. 215; Memphis Ry. Co. v. Dow, 22 Blatch. 48; Holt v. Winfield Bank, 25 Fed. R. 812; Grant v. Coal Co., 80 Pa. 208; First Nat. Bank v. Stewart, 107 U. S. 678; Sieber v. Com. Nat. Bank, 77 Fed. R. 957.

⁶ Compare § 25, *ante*, and Louisiana v. Wood, 102 U. S. 294.

⁷ Ridgway Co. v. McCarthy, 96 U. S. 258, 267; San Antonio v. Mehaffy, 96 U. S. 312, 315; Whitney Arms Co. v. Barlow, 63 N. Y. 62. This last case contains the best statement of the principle in any of the decisions.

it can be ratified by the corporation. The liability in tort depends solely upon the question whether the agent was acting upon the corporation's affairs. The question will be noticed in section 105, *post*, notes 2, 3 and 5, and section 120, *post*, note 9. The principle will be found applied under varying circumstances. Typical cases are loans upon real-estate security, or loans in excess of corporate power or to inhibited individuals. All such contracts as well as the security therefor may be enforced. But where the *ultra vires* transaction has been carried out and is consummated upon both sides, the law leaves the party where it finds him and grants no relief.⁸ A case of this kind was ruled upon where a man sold to a national bank certain bonds, the bank agreeing to replace them at a certain price. After a demand and tender of the price, and a refusal by the bank to deliver, suit was brought for the value of the bonds less the price. The defense was that the contract was *ultra vires*, as it unquestionably was, but a recovery was upheld in an able opinion.⁹

A very able court of appeal held that a bank by an *ultra vires* transaction having acquired stock in another national bank could be held for the statutory liability upon the stock.¹⁰ The decision was perfectly sound, because, the *ultra vires* transaction having been consummated, it was closed; neither party could obtain relief, and the bank, being able to hold the stock, could be held as a stockholder, because the statute makes no exceptions, and the statute imposing the stock liability creates a *quasi*-contract, to which the defense of *ultra vires* is wholly immaterial. But in *California Bank v. Kennedy*, 167 U. S. 362, the court, reversing 101 Cal. 495, where there is an able opinion, held that there was no liabil-

⁸ See note 18 to this section.

⁹ *Logan Co. Nat. Bank v. Townsend*, 139 U. S. 67. See *First Nat. Bank v. Anderson*, 172 U. S. 573.

¹⁰ *First Nat. Bank v. Hawkins*, 79 Fed. R. 61, reversed in the Supreme Court of the United States in *First*

Nat. Bank v. Hawkins, 174 U. S. 364. But see *McDonald v. Williams*, 174 U. S. 397, where the court seems to recognize the distinction of the text. See also *Goodland v. Bank of Darlington*, 74 Mo. App. 365.

ity upon the stock.¹¹ This decision can only be justified on the erroneous theory that no title in the stock passed, and the transferror could be held, and the bank had obtained nothing. But the court had held over and over again that such a transaction could be ratified. It surely would not undertake to hold the ridiculous doctrine that the bank could not confer title by a sale. The bank was claiming the stock, but was denying its liability as a stockholder. The court also overlooked the fact that the *ultra vires* transaction having been consummated, neither party was entitled to relief, and the further fact that the statutory liability was not imposed by contract, but by statute, and was a *quasi-contract*. In this opinion the court quotes, with a seeming lack of comprehension, the language of Selwyn, L. J., in *Royal Bank's Case*, L. R. 4 Ch. 252, 261: "If it could have been shown that it was an act absolutely prohibited, . . . a different question would have arisen." The distinction was brought to the court's attention, but in both the two cases stated from our highest court the judges seem not to have understood the two meanings of the phrase *ultra vires*, nor to have comprehended the essential and fundamental difference between a contract and a *quasi-contract*.¹² If the dis-

¹¹ It should be noted that Judge Harlan dissented. It is unfortunate that he wrote no opinion. If a lawyer will compare the first case in note 10, *supra*, with this California Bank case, he will notice the difference between a judge who is an accurate and scientific lawyer, and another judge, whose life having been passed in other distracting pursuits, does not bring to the service of the law that undivided attention which this most difficult of all human sciences demands. No man can be a lawyer in the intervals of being something else. It was said of Lord Brougham that "he knew a little of everything, even of law."

¹² The language of the decisions of the United States Supreme Court upon this question is a hopeless muddle. Since that court rarely expressly overrules itself, the practitioner is left struggling through a perfect "Serbonian bog." But it is confidently believed that if the distinction suggested in the text be applied, almost all the cases can be reconciled. General expressions in the form of those easy and fluent *dicta*, which give the profession so much trouble, will need to be disregarded, and the case decided confined strictly to the facts as they appear in the case. Such general and sweeping declarations as are found in *Union Pacific Ry.*

inction here made is applied, it will explain a greater part of the decisions of courts as to *ultra vires* banking transactions;¹³ but as many of the cases stand, recognizing all acts, whether *ultra vires* in the proper sense, or forbidden by other rules of law, as on the same level, the *dicta* of the decisions are hopelessly irreconcilable, and the confusion is rapidly growing worse. The actual decisions are not in conflict, except the decisions pointed out in this section upon *ultra vires* purchases of stock. There is a large number of cases in addition to those cited in the preceding notes, where, the act being forbidden by a statute or an express rule of law of general application; the contract sought to be created has been held wholly void, and the party seeking recovery, if he is entitled to recover, has been relegated to *quasi-contract* for relief.¹⁴ There are numerous other cases where the contract was merely in excess of the corporate powers, though otherwise innocent, where the contract has been enforced.¹⁵

Co. v. Chicago, etc. Ry. Co., 163 U. S. 564, 581, will need to be passed over. The distinction is not new. It is explained in *Whitney Arms Co. v. Barlow*, 63 N. Y. 62. It is noticed, without any apparent appreciation of its effect, in *McCormick v. Market Nat. Bank*, 165 U. S., at p. 553. Lord Selborne, in *Attorney-General v. Railway Co.*, 5 App. Cas. 473, 478, almost enforces the distinction. Another judge practically recognizes it in *Seeber v. Comm. Nat. Bank*, 77 Fed. R. 957, but he does not make the distinction plain, if he had it in mind.

¹³ Compare the cases cited in the preceding and the next note.

¹⁴ *Allen v. Freedmen's Bank*, 14 Fla. 418; *Western Bank v. Mills*, 7 Cush. 539; *Richmond Bank v. Robinson*, 42 Me. 489; *Johnson v. Charlottesville Nat. Bank*, 3 Hughes, 657; s. c., Fed. Cas. No. 7425; *Whetstone v. Bank of Montgomery*, 9

Ala. 875; *Fridley v. Bowen*, 87 Ill. 151 (wrong). It is held that no recovery can be had if the parties are *in pari delicto*. *Bank v. Robinson*, 24 Me. 274; *Phila. Loan Co. v. Towner*, 13 Conn. 249. See also *Weber v. Spokane Nat. Bank*, 64 Fed. R. 208, 29 U. S. App. 97.

¹⁵ *Bond v. Central Bank*, 2 Kelly, 92; *Richmond Bank v. Robinson*, 42 Me. 489; *Pratt v. Short*, 79 N. Y. 437; *Rome Savings Bank v. Kramer*, 102 N. Y. 331; *St. Jos. Ins. Co. v. Hauck*, 71 Mo. 465; *Smith v. First Nat. Bank*, 45 Neb. 444; *Noble v. Cornell*, 1 Hilt. 98; *Bank of Middlebury v. Bingham*, 33 Vt. 621; *Richards v. Kountze*, 4 Neb. 200; *Walden Nat. Bank v. Birch*, 130 N. Y. 221; *Nat. Pemberton Bank v. Porter*, 125 Mass. 333; *Atlas Nat. Bank v. Savery*, 127 Mass. 75; *Prescott Nat. Bank v. Butler*, 157 Mass. 548; *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40; *First Nat. Bank v. Gil-*

There is a number of other cases, which might at a first glance seem to be opposed to this distinction, yet, if they are carefully examined, it will be seen they are correctly decided, since each case can be treated as one on the loan and not on the contract.¹⁶ But as the law stands, the safest rule to follow, where the contract is likely to meet the objection of being beyond the corporate power, is to sue in *quasi*-contract on the common count joined with a count on the contract. If for any reason that course is not safe, the cause of action, if the act be merely beyond the corporate power and not otherwise illegal, as has been heretofore pointed out, by the great weight of authority, with the exception of a purchase of stock, will be upheld, if from holding otherwise an injustice would result by a party obtaining a benefit with-

hilar, 72 Mo. 77; First Nat. Bank v. Smith, 8 S. Dak. 7; Warner v. De Witt Co. Bank, 4 Brad. 305; First Nat. Bank v. Elmore, 52 Iowa, 541; State Nat. Bank v. Flathers, 45 La. Ann. 75; Thornton v. Ex. Nat. Bank, 71 Mo. 221; Graham v. National Bank, 5 Stew. 804; Oldham v. First Nat. Bank, 85 N. C. 240; Elmer v. Bank, 12 Kan. 238; Am. Nat. Bank v. Nat. Wall Paper Co., 77 Fed. R. 85; First Nat. Bank v. Elevator Co., 10 S. Dak. 167; Nielsville Bank v. Tuthill, 4 Dak. 295; St. Paul Trust Co. v. Jenks, 57 Minn. 248; Bates v. State, 2 Ala. 451. See §§ 181, 191, 338, *post*.

¹⁶ Gold Min. Co. v. National Bank, 96 U. S. 640; Wyman v. Citizens' Bank, 29 Fed. R. 734; Corcoran v. Batchelder, 147 Mass. 541. Some of these cases were where an express prohibition had been violated. The recovery was on the loan. The case of Workingmen's Banking Co. v. Rautenberg, 103 Ill. 460, could have been treated as one on the loan. In other words, it can be said that the suit is really on the loan, and

the written contract is simply treated as evidence of the receipt of the money. The parties were not *in pari delicto* because in many instances the corporation was the party for whose benefit the statute was passed, just as, on the contrary, the borrower under an usurious contract with the bank is considered the one for whose benefit the statute was passed. The corporation was certainly in a better position than a man who had united with its officers to do an act prejudicial to it. These cases illustrate the proposition. Shoemaker v. Nat. Mechanics' Bank, Fed. Cas. No. 12,801; Mills Co. Nat. Bank v. Perry, 72 Iowa, 15; Portland Nat. Bank v. Scott, 20 Oreg. 421; O'Hare v. Second Nat. Bank, 77 Pa. 96; Rich v. State Nat. Bank, 7 Neb. 201; Norton v. Derry Nat. Bank, 61 N. H. 249; Thompson v. St. Nicholas Nat. Bank, 113 N. Y. 325; Thompson v. St. Nicholas Nat. Bank, 146 U. S. 240; Williams v. Am. Nat. Bank, 85 Fed. R. 376, 56 U. S. App. 316.

out compensation. But under the decisions of the Supreme Court of the United States the principle so often laid down in decisions, that the objection of *ultra vires* can only be urged by the government, is not a safe rule to follow. Where it is sought to rescind an *ultra vires* contract, or an illegal contract, whose illegality depends on an express rule of law, if the contract has been fully executed on both sides, and the only ground for rescission is that the act was either contrary to law or *ultra vires* in the proper sense, the law leaves the party where it finds him and denies a recovery.¹⁷ If a party seeks for equitable relief against such a contract, the law compels him to do equity by paying back what he has obtained, before granting him any relief.¹⁸ The presumption in all cases is that the corporate acts are within the corporate powers.¹⁹

§ 34. Banking powers.—The charter of a banking corporation usually confers upon it general banking powers, with a prohibition, very often inserted, against exercising the power of issuing notes. The meaning of this phrase “banking powers” has been noticed incidentally in the consideration of the definition of banking.¹ The meaning of the phrase varies under different statutory enactments.² The cases cited

¹⁷ *First Nat. Bank v. Stewart*, 107 U. S. 676; *Mapes v. Scott*, 94 Ill. 379; *Attleborough Nat. Bank v. Rogers*, 125 Mass. 339; *Hennessy v. City of St. Paul*, 54 Minn. 219; *Wherry v. Hale*, 77 Mo. 20; *Chapin v. Merchants' Nat. Bank*, 14 N. Y. St. R. 272. But in the case of *Burrows v. Niblack*, 84 Fed. R. 111, the court utterly forgot this principle, and held that a national bank could recover what it had paid for its own stock, and that too without tendering back the stock. The opinion is incomprehensible.

¹⁸ *Elder v. First Nat. Bank*, 12 Kan. 238. But see the case cited in the last note, where the same prin-

ciple ought to have applied in an action at law.

¹⁹ *Morris R. R. Co. v. Sussex R. R. Co.*, 21 N. J. Eq. 542; *South. Exp. Co. v. Western R. R. Co.*, 99 U. S. 191; *Baker v. N. W. Loan Co.*, 36 Minn. 185; *Rider Raft Co. v. Roach*, 97 N. Y. 378.

¹ See § 2, *ante*.

² See §§ 3, 4, 5, *ante*, and *Blair v. Perpet. Ins. Co.*, 10 Mo. 559; *Huber v. Germ. Cong.*, 16 Ohio St. 371; *State v. Stebbins*, 1 Stew. 299; *Smith v. State*, 21 Ark. 294; *People v. Manhattan Bank*, 9 Wend. 351; *State v. Granville Alex. Soc.*, 11 Ohio, 1; *People v. Insurance Co.*, 15 Johns. 358.

in the preceding section necessarily are concerned with banking powers. The subject will be examined at length in a subsequent portion of this work.³ We mention now that while the powers of discounting and depositing are always conferred upon banks, there has been considerable difference of opinion as to whether the power of discounting included the power of purchasing commercial paper.⁴ The better opinion is that it does.

§ 35. Liability of corporators as partners.—Sometimes it will happen that a number of persons will assume to institute a corporation without having received any charter whatever. If a corporation be afterwards formed and the act be lawfully ratified, either expressly or by receiving a benefit, the corporation may be held upon the act done before the formation of the corporation.¹ The corporation may claim the benefit of an act done on its behalf before the incorporation.² But if there be no ratification, because no corporation results, the promoters or alleged corporators incur the responsibility of partners and may be held liable as such.³ If a ratification has taken place, it would seem to be true that where the other party has contracted with the corporation he ought not to be permitted to hold the corporators liable as partners.⁴ Yet if the act was one incapable of ratification,⁵ the corporation afterwards formed cannot be held; as, for instance, where the act was prohibited by an express rule of law.⁶ If no corporation be afterwards

³ See § 118 et seq., *post*.

⁴ The cases may be found collected in 9 Am. & Eng. Encyc. Law (2d ed.), 471, notes 1 and 2.

¹ 1 Thomp. on Corp., sec. 480.

² 4 Thomp. on Corp., sec. 5321.

³ *Kaiser v. Lawrence Sav. Bank*, 56 Iowa, 104; *Pettis v. Atkins*, 60 Ill. 454; *Allen v. Pegram*, 16 Iowa, 163; *McLennan v. Anspaugh*, 2 Kan. App. 269; *Hauser v. Tate*, 85 N. C. 81.

⁴ See *Huffcutt*, Agency, 44.

⁵ This statement applies only to those acts which are beyond the scope of the corporate powers because forbidden by law, as explained in § 32, *ante*. But all torts and contracts merely beyond corporate powers may be ratified. See next note.

⁶ *California Bank v. Kennedy*, 167 U. S. 362, 368, contains a correct statement of the rule, but it is wrongly applied in that case. But it is properly applied in *Central*

formed, he may hold the parties liable on the theory of an implied warranty of authority,⁷ under the general principles of the law of agency.

§ 36. **Direct liability for unauthorized banking.** — We have in the preceding sections noticed the result of acts of unauthorized banking as between other parties than the bank and the state. How far the state may go in forfeiting the charter of the bank for illegal banking in *quo warranto* or in actions in the nature of *quo warranto* will be considered later in this work.¹ The statutes often prescribe a criminal responsibility for illegal acts by the various officers of the bank. This subject will be considered in connection with officers.² There have been statutes of various states which impose a penalty upon individuals for illegal banking, and in other cases define the conduct as a crime. The cases will be found referred to in the note below.³

Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 59, and in McCormick v. Market Nat. Bank, 165 U. S. 538, 549. In Jacksonville Ry. Co. v. Hooper, 160 U. S. 514, 524, the principle is correctly applied as to an innocent act *ultra vires*, but put upon a slightly different ground than the one above.

⁷ 1 Thompson on Corp. 416; Medill v. Collier, 16 Ohio St. 599; Seeberger v. McCormick, 178 Ill. 404, 73 Ill. App. 87, although in the latter case a corporation was formed.

¹ See § 319 et seq., *post*.

² See § 81 et seq., *post*.

³ State v. Williams, 8 Tex. 255; Williams v. State, 23 Tex. 264; State v. Presbury, 13 Mo. 342; Brown v. State, 11 Ohio, 276; Commonwealth v. Scott, 4 Rand. 143; Mills v. State, 23 Tex. 295; Burkett v. Lanata, 15 La. Ann. 337; People v. Bartow, 6 Cow. 290; People v. Brewster, 4 Wend. 498; People v. Doty, 80 N. Y. 225; Commonwealth v. Sponsler, 16 Pa. Co. Ct. R. 116; State v. Scougal, 3 S. Dak. 55.

CHAPTER III.

LEGISLATIVE REGULATION OF BANKING.

§ 37. **General scope of power.**— It has already been stated that the state in the exercise of its legislative power can prohibit private banking altogether.¹ A very different question would arise if the state should attempt to abolish banking altogether. The question has not presented itself, nor can any one conceive that a legislature would attempt so to do. Such an act would unquestionably be not a valid exercise of the police power. But the state has always the power to regulate the business of banking,² and has done so in many ways. How far the state governments can regulate national banks by taxation has been already noticed.³ The purpose of this chapter is to state those regulations that have been made both as to state banks, corporate or private, and to national banks.

§ 38. **License taxes.**— A preliminary question as to a license fee by a municipality will always be whether the power to license has been granted. This is simply a question of statutory construction.¹ When a national or state license is in question the sole inquiry is whether the person, natural or artificial, falls within the terms of the act. This is also a question of statutory construction.² As to licenses

¹ See § 9, *ante*, and § 45, *post*.

² *Blaker v. Hood*, 53 Kan. 499; *Cummings v. Spannhorst*, 5 Mo. App. 21.

³ See § 25, *ante*, and see further § 44, *post*.

¹ *Macon v. Macon Sav. Bank*, 60 Ga. 133; *Hinckley v. Belleville*, 43 Ill. 483.

² *State v. Bank of Mansfield*, 48

La. Ann. 1029; *City of New Orleans v. New Orleans Sav. Inst.*, 32 La. Ann. 527; *State v. Southern Bank*, 31 La. Ann. 519; *State v. Columbia*, 6 Rich. 495; *City of New Orleans v. New Orleans Banking Co.*, 32 La. Ann. 104; *Warren v. Shook*, 91 U. S. 704; *Selden v. Equitable Trust Co.*, 94 U. S. 419.

granted by cities, towns or counties, the implied limitation is that they shall be reasonable,³ in view of the fact that the power to license does not in such a case include the power to tax for revenue, unless expressly granted.⁴ The limitation on state licenses or taxation is that they may tax national banks only to the extent permitted by the national government,⁵ and foreign corporations, if they are not engaged in foreign or interstate commerce.⁶ The rule as to banks would be the same as to other corporations, but it is difficult to see how a bank could be engaged in interstate commerce.

§ 39. Limitations on indebtedness.—Various laws provide limitations as to the indebtedness of banks, both state and national, and limitations upon the indebtedness of individuals toward the bank. These regulations are no doubt perfectly legal. The effect of them, when violated, upon contracts has been shown,¹ and their effect as fixing a civil responsibility upon the officers,² as well as exposing the charter to forfeiture, will be later examined.³

§ 40. Safety funds and deposits.—The questions that arose under the state laws in the days of "wild-cat" banking as to the funds deposited to secure circulation are now obsolete. A reference to cases will be found in the notes.¹ The requirement was made as to banks engaged both in issuing notes and in receiving deposits,² and the state was merely

³ See the next note.

⁴ 1 Dillon on Mun. Corp. (4th ed.), sec. 357.

⁵ See § 25, *ante*.

⁶ See 6 Thompson on Corp., sec. 8108 et seq.

¹ See §§ 32, 33, *ante*.

² See § 81, *post*, et seq., § 89, *post*, et seq., and § 355, *post*.

³ See § 319, *post*.

¹ A curious attempt to prevent redemption of notes will be found in case of *People v. Whittemore*, 4 Mich. 27. See for various phases of

obsolete law: *Young v. Hughes*, 12 Smedes & M. 93; *Townsend v. Smith*, 12 N. J. Eq. 350; *Bank v. Downer*, 28 Vt. 635; *Commissioners v. Walker*, 6 How. 143; *In re Dyott*, 2 Watts & S. 463; *Flagg v. Munger*, 9 N. Y. 483; *People v. Holmes*, 3 Mich. 544; *Willard v. Dubois*, 29 Ill. 48.

² *Marion Sav. Bank v. Dunkin*, 54 Ala. 471; *Marine Bank v. State Auditor*, 14 Ill. 185; *Ewing v. Roberson*, 15 Ind. 26. But in other cases the security was for the depositors

the custodian of the fund and not a guarantor against loss by the note-holders.³ The fund seems to have been in some cases a general fund contributed by all the banks, and the whole fund was liable for the notes of each bank.⁴ The idea that underlay all these provisions has been incorporated into the national banking law, by providing for a deposit of bonds to secure circulation. The government is a trustee of this deposit, not only for the note-holders, but for all the creditors,⁵ in the sense that after payment of the notes the surplus must be restored to the creditors of the bank. The government can claim no priority for its own debts.⁶

§ 41. Requirement of reports.—Under the national banking act those banking institutions therein provided for are required to make five reports each year, at times to be designated by the comptroller, and special reports as may be called for.¹ The penalty provided is a fine for each day's failure to report. State laws require reports from banking institutions organized under state laws. They may also be required from private bankers. The penalty provided in some of the states is a prohibition against bringing a suit in the state courts. This prohibition the state courts will enforce against a foreign corporation,² but the United States courts will not. The state courts require a strict compliance with the law.⁴

§ 42. Bank examiners.—State statutes provide for public bank examiners, who may be given a right of visitation and

as well. *People v. Walker*, 17 N. Y. 502; s. c., 21 Barb. 630; *Medill v. Collier*, 16 Ohio St. 599.

³ *Clark v. State*, 7 Cold. 306; *State v. Rusk*, 21 Wis. 212; *Citizens' Bank v. Gay*, 47 La. Ann. 551.

⁴ *Elwood v. State Treasurer*, 23 Vt. 701; *Receiver of Danby Bank v. State Treasurer*, 39 Vt. 92.

⁵ *Cook Co. Nat. Bank v. United States*, 107 U. S. 445.

⁶ *United States v. Cook Co. Nat. Bank*, 9 Biss. 55, was reversed by the above case.

¹ Sec. 5211, Rev. Stat. U. S.

² *Bank of British N. A. v. Alaska Imp. Co.*, 97 Cal. 28.

³ *Barling v. Bank of British N. A.*, 50 Fed. R. 260, 1 C. C. A. 510; s. c., 44 Fed. R. 641.

⁴ *Bank of British N. A. v. Alaska Imp. Co.*, 97 Cal. 28; *People v. Campbell*, 14 Ill. 400. See also *Bank of British N. A. v. Madison*, 99 Cal. 125; *State v. Union Bank*, 4 Robt. 499; *Boisregard v. New York Banking Co.*, 2 Sandf. Ch. 23.

of full inquiry into the condition of the bank, of examining all the officers or agents thereof, with power to institute proceedings to close the bank.¹ The examiners provided for under the national banking law have practically the same powers,² except that the exercise of power is primarily with the comptroller of the currency, who is also given ample powers, under the act, to take possession of the bank by an examiner or a receiver, and close it up when satisfied that the bank is insolvent,³ or where it has failed to redeem any of its circulating notes.⁴ The action of the comptroller is presumed to be that of the secretary of the treasury⁵ and is conclusive as to the receiver's authority.⁶ Yet it has been held that his decision is not evidence of insolvency in a suit by the receiver against the stockholders for contribution.⁷

§ 43. Other regulations of national banks.—Section 5190 and the following sections of the Revised Statutes contain other regulations of national banks. The requirement that a national bank shall transact its usual business at its banking house, the requirements as to "lawful money reserves,"¹ the regulations as to usurious rates of interest, as to discounts and loans, are all within the power of congress. The effect of a violation of these regulations will be examined under various divisions in this work.²

§ 44. Regulation of national banks by states.—It has already been pointed out that the state governments have no control over national banks except what has been granted to them by the federal government.¹ Yet the state government may prohibit certain conveyances, and a national bank

¹ *Commonwealth v. Farmers' Bank*, 21 Pick. 542; *State v. Union Bank*, 4 Rob. (La.) 499.

² Sec. 5240, Rev. Stat., amended 18 Stat. 329.

³ Act of Congress, June 30, 1876, sec. 1, 19 Stat. 63.

⁴ Secs. 5226 et seq., Rev. Stat. U. S.

⁵ *Price v. Abbott*, 17 Fed. R. 506.

⁶ *Washington Nat. Bank v. Eckels*, 57 Fed. R. 870.

⁷ *Bowden v. Morris*, 1 Hughes, 378, Fed. Cas. No. 1715. But the case is wrong.

¹ Amended by 24 Stat. 559.

² See §§ 32, 33, *ante*, and §§ 191 and 201, *post*.

¹ See § 25, *ante*.

will be subject to the general law;² but national banks are not covered by an act of the state which requires all corporations to file with a certain officer the name of a designated agent.³ Indirectly, too, the state governments can control national banks by their criminal laws where congress has not done so;⁴ and the highest authority has held that both the state government and the federal government can make the same act of a national banker a crime as to each sovereignty.⁵ But it is held that the statute of the national government as to usurious dealings of national banks is exclusive of any state legislation,⁶ as to a civil liability.

§ 45. **State regulation of foreign banks.**—It is hardly necessary to state that a state statute as to foreign banks will not affect national banks, which are chartered for the whole nation. A foreign bank is permitted by comity to make a contract in a state other than its charterer if the act is not forbidden by the law of its creation, but its general franchises, it has been said, can be exercised only in the state of its origin.¹ This must be understood with the qualifications that the act be not forbidden by law in the state where

² *Traders' Nat. Bank v. Chipman*, 164 U. S. 347; *Chipman v. McClellan*, 159 Mass. 363.

³ *First Nat. Bank v. Commonwealth*, 33 S. W. R. 1105.

⁴ *State v. Fuller*, 34 Conn. 280, as to embezzlement; *State v. Fields*, 98 Iowa, 748, and *State v. Bardwell*, 72 Miss. 535, as to receiving deposit knowing the bank to be insolvent. Compare *State v. Menke*, 56 Kan. 77.

⁵ *Cross v. State*, 132 U. S. 131; *Hoke v. People*, 122 Ill. 511; *State v. White*, 101 N. C. 770; *Commonwealth v. Seeberg*, 94 Pa. 85; *State v. National Bank*, 2 S. Dak. 568. *Contra*, *Commonwealth v. Felton*, 101 Mass. 204. But the state statute prohibiting a cashier from engaging in any other business does not

apply to a cashier of a national bank. *Allen v. Carter*, 119 Pa. 192.

⁶ *Farmers' Bank v. Dearing*, 91 U. S. 29; *Peterborough Nat. Bank v. Childs*, 133 Mass. 248; *Imp. & Traders' Nat. Bank v. Littell*, 46 N. J. Law, 506; *First Nat. Bank v. Duncan*, Fed. Cas. No. 4804; *Slaughter v. First Nat. Bank*, 109 Ala. 157; *Parker v. Rochester Nat. Bank*, 59 N. H. 310; *First Nat. Bank v. Garlinghouse*, 22 Ohio St. 492. *Contra*, *First Nat. Bank v. Lamb*, 50 N. Y. 95. But as to the law of crimes, see § 191, *post*.

¹ *Lane v. Bank of West Tennessee*, 9 Heisk. 419. *Contra*, *Bank of Marietta v. Pindall*, 2 Rand. 465. See *City Bank v. Beach*, 1 Blatch. 425

the act is done, and, as some courts say, if the act be not *malum in se*. There have been cases where foreign banks have been forbidden to carry on a banking business by an agent located in the state.² Foreign banks are within state statutes against unauthorized banking,³ and statutes have been upheld which prohibit the circulation of notes of foreign banks,⁴ although in the absence of statutory prohibition foreign currency may be put into circulation.⁵ The general rule, of course, is that a state may prescribe what terms it pleases to foreign banks doing business in the state.

² Conn. Mut. Life Ins. Co. v. Albert, 39 Mo. 181. See the next note. N. Y. 53; Sackett's Harbor Bank v. Codd, 18 N. Y. 240.

³ Bank of Newberry v. Stegall, 41 Miss. 142. ⁵ Ballston Spa Bank v. Marine Bank, 16 Wis. 125.

⁴ Merchants' Bank v. Spalding, 9

CHAPTER IV.

STOCKHOLDERS.

§ 46. **In general.**—The subject of stockholders in corporations is so large that no attempt will be made to examine the general subject except as the subject has been peculiarly illustrated by decisions as to banks. It will be assumed that the general principles applicable do not need citations to establish their existence. It will be necessary, however, to state those general principles in order to show the connections of this subject. It is settled that a person may become a stockholder in a banking corporation just as he becomes a stockholder in any other corporation: (1) by a valid subscription to the capital stock; (2) by a transfer of shares to himself; (3) by estoppel. For the purpose of liability on stock it will appear that two different persons may be considered as the owners of the same shares. Any person competent to become a stockholder will be so held. Even if the stockholder be a married woman laboring under the disability of coverture,¹ and in case of national banks, any person permitted by the laws of the place where the bank is situated may be considered a stockholder.²

§ 47. **Increase or decrease of stock.**—The original capital stock cannot be increased or decreased without legislative authority.¹ Such authority in case of national banks is given by sections 5142 and 5143 of the Revised Statutes with the act of May 6, 1886. Where the constitution requires every banking act to be submitted to a vote of the people, a bank

¹ *In re Reciprocity Bank*, 22 N. Y. Hobart v. Johnson, 8 Fed. R. 493; 9; *Simmons v. Dent*, 16 Mo. App. Witters v. Sowles, 32 Fed. R. 767. 288.

¹ *Bank of Kentucky v. Schuykill*

² *Keyser v. Hitz*, 133 U. S. 138; *Bank*, 1 Pars. Eq. Cas. 180. See also *Anderson v. Line*, 14 Fed. R. 405; *Byrne v. Union Bank*, 9 Robt. 433.

cannot increase or decrease its capital stock without the permission of an act ratified by popular vote.² When an increase in the capital stock has been permitted by the proper authority, the holder of the increased stock cannot set up irregularities in the making of the increase to defeat his liability as a stockholder.³ In the case of national banks when the increase has been allowed by competent authority, to wit, the comptroller of the currency, who has issued his certificate, a subscriber to the increase cannot claim to be not a stockholder because the original increase has been reduced before the issuance of the certificate.⁴ But no one becomes a stockholder in the increased stock until the comptroller issues his certificate, even though the amount has been paid into the bank for the new stock.⁵ In such a case the bank holds the amount paid in as a trustee,⁶ and, if the increase of stock be not allowed by the comptroller, the amount paid in must be restored.⁷ When the capital stock is reduced on

² *People v. Nat. Sav. Bank*, 129 Ill. 618; *McNulta v. Corn Belt Bank*, 164 Ill. 427.

³ *Veeder v. Mudgett*, 95 N. Y. 295. But *Palmer v. Bank of Zumbrota*, 75 N. W. R. 380, says the stockholder is not estopped as against past creditors.

⁴ *Delano v. Butler*, 118 U. S. 634; *Aspinwall v. Butler*, 133 U. S. 595. The certificate is conclusive. *Columbia Nat. Bank v. Matthews*, 85 Fed. R. 934, 56 U. S. App. 636. The subscription is binding although the whole amount is not subscribed. *Scott v. Latimer*, 89 Fed. R. 843, but it is a strained construction of the statute. The dissenting opinion is much better law.

⁵ *Charleston v. People's Nat. Bank*, 5 S. C. 103; *Winters v. Armstrong*, 37 Fed. R. 508; *McFarlin v. First Nat. Bank*, 68 Fed. R. 868; s. c., 16 C. A. 46; *Schierenberg v. Stephens*,

32 Mo. App. 314; *Stephens v. Follett*, 43 Fed. R. 842. In the last case the bank officers had transferred old stock on the books to the subscriber.

⁶ *Armstrong v. Law*, 27 Wkly. Law Bul. 100.

⁷ *Schierenberg v. Stephens*, 32 Mo. App. 314; *Winters v. Armstrong*, 37 Fed. R. 508. These last two cases need careful reading; the syllabus is misleading; they will show that the bank was in fact held trustee. But in a case where the comptroller seems to have been guilty of questionable conduct, it was held that the comptroller could not first refuse to authorize the increase, and then, after insolvency of the bank, issue his certificate of the increase and thus hold the subscribers to the increased capital. *Mathews v. Columbia Nat. Bank*, 77 Fed. R. 372; but see note 4, *supra*, on this case.

account of bad debts, but the debts are afterwards realized, a stockholder cannot claim his proportion of the amount realized;⁸ yet after the capital is actually reduced, the bank cannot retain as surplus the portion of the capital which remains over and above the reduced capital.⁹ The stockholder who has subscribed to the increase and paid in his subscription and has been entered on the books as a stockholder of a national bank is a stockholder in spite of the fact that his certificates of stock have never been issued to him.¹⁰ The increased capital is not void although through fraud it has not all been paid in,¹¹ as required by law.

§ 48. Original subscription.—As a general rule any paper which shows a purpose to subscribe to the stock of a corporation will be binding.¹ Whether an oral subscription be valid or not must depend on the provisions of the governing statute,² or in the absence of such provisions on the general principles governing the law of corporations. The whole subject of the binding force of a subscription,³ as well as the remedy of the subscriber to avoid the same for fraud⁴ or for an alteration in the charter,⁵ are not properly a part of this particular treatise. The rights of parties under statutes in over-subscriptions have received some consideration from courts in the cases cited in the note.⁶ The state was

⁸ *McCann v. First Nat. Bank*, 112 Ind. 354.

⁹ *Seeley v. Nat. Ex. Bank*, 78 N. Y. 608; s. c., 8 Daly, 400.

¹⁰ *Pac. Nat. Bank v. Eaton*, 141 U. S. 227. The laches of a subscriber may defeat his right to object. *Olson v. State Bank*, 67 Minn. 267.

¹¹ *Latimer v. Bard*, 76 Fed. R. 536. See note 4, *supra*.

¹ See next note. This binding effect the board of directors cannot release. *McNulta v. Corn Belt Bank*, 164 Ill. 427.

² See 1 *Thomp. on Corp.*, secs. 1136-1194.

³ See 1 *Thomp. on Corp.*, sec. 1216 et seq.

⁴ See 1 *Thomp. on Corp.*, sec. 1360 et seq. A subscription or a purchase of stock may be rescinded for fraud even after insolvency where there is no negligence or estoppel. *Wallace v. Bacon*, 86 Fed. R. 553; *Stufflebeam v. De Lashmutt*, 83 Fed. R. 449. But *Wallace v. Hood*, 89 Fed. R. 11, holds that the receiver cannot agree to a rescission.

⁵ See 1 *Thomp. on Corp.*, secs. 1267-1299.

⁶ *Meads v. Walker*, *Hopk. Ch.* 587;

held not liable as a stockholder for personal liability,⁷ but was held liable as a trustee for diverting capital.⁸

§ 49. Stockholders by transfer.—Shares of stock are from their nature alienable, and, subject to the limitations lawfully imposed upon their alienability by law, or by the corporation or by the holder, are transferred by indorsement and delivery of the certificate. Ordinarily such a transfer makes the transferee a stockholder and the transferrer ceases to be such, where the transfer is in good faith and recorded on the books of the company.¹ The books of the corporation are the controlling evidence as to the ownership of shares;² but if the transferrer in good faith has done all that he is required to do to make the transfer complete on the books of the company, the failure of the proper officers to record the transfer will not continue him as a stockholder.³ It seems to be sufficient even if the officers knew of the transfer.⁴ If, however, the transfer is collusive or for the purpose of escaping liability, the transferrer as well as the transferee will be held as a stockholder; certainly in the case of national banks,⁵ and on principle under state statutes.⁶ An apparent exception seems to be that of a pledgee,

Clarke v. Brooklyn Bank, 1 Edw. Ch. 361; State v. Lehre, 7 Rich. Law, 234. A subscription in another's name was not permitted to escape a scaling-down statute. Union Bank v. McDonough, 5 La. 63.

⁷ Consolidated Bank v. State, 5 La. Ann. 44. This opinion is a singular exhibition of folly.

⁸ Dabney v. State Bank, 3 S. C. 124.

¹ Johnson v. Laffin, 103 U. S. 800; s. c., 5 Dill. 65. But statutes sometimes prescribe a different rule. Chatam Bank v. Brobston, 99 Ga. 801; Harper v. Carroll, 69 N. W. R. 610.

² Man v. Cheeseman, Fed. Cas. No. 9002a; Irons v. Manuf. Nat. Bank, 121 U. S. 27; s. c., 27 Fed. R. 591;

In re Emp. City Bank, 18 N. Y. 199. They make the transferee liable as stockholder even in case of collusive transfers. Foster v. Lincoln, 74 Fed. R. 382, 79 Fed. R. 170; Robinson v. Beall, 26 Ga. 17.

³ Snyder v. Foster, 73 Fed. R. 136, 19 C. C. A. 406; Hayes v. Shoemaker, 39 Fed. R. 319. Compare Price v. Whitney, 28 Fed. R. 297.

⁴ Whitney v. Butler, 118 U. S. 655.

⁵ National Bank v. Case, 99 U. S. 628; Barden v. Johnson, 107 U. S. 251; Stuart v. Hayden, 169 U. S. 1; s. c., 72 Fed. R. 402; Witters v. Sowles, 32 Fed. R. 130; Foster v. Lincoln, 74 Fed. R. 382; s. c., 79 Fed. R. 170.

⁶ So held in case of a transfer to

who takes stock merely as collateral security, and does not receive title himself but has the stock stand in the name of some irresponsible third party. In such a case the pledgee is not liable as a stockholder.⁷ The same result is obtained by the entry of the pledgee's name on the books "as pledgee,"⁸ and, on principle, with any other words which showed the holding as a trustee, if the fact was as represented. If the transfer be collusive, both the transferor and the transferee are liable as stockholders,⁹ and the same result follows if the transfer be made after insolvency of the bank with notice of the fact.¹⁰ In some of the states statutes render bank stockholders liable for all debts created while they were stockholders and require all transfers of stock to be recorded in some proper office.¹¹ This liability is unaffected by a transfer. One may become a stockholder if he is the real owner of the

the bank itself, which would assume no liability to answer to the statute. In *re* Reciprocity Bank, 22 N. Y. 9.

⁷ *Anderson v. Phila. Warehouse Co.*, 111 U. S. 479. This case is absolutely irreconcilable with *National Bank v. Case*, 99 U. S. 628. In the latter case the transfer was made to the corporation and then to the dummy. In the other case the transfer was to the president of the corporation for the corporation and then to the dummy. In the *Anderson* case the two ablest judges in the court dissented. *Nat. Park Bank v. Harmon*, 79 Fed. R. 891, follows the case. See *Chatam Bank v. Brobston*, 99 Ga. 801, under a state law, *contra*.

⁸ *Pauly v. State Loan & Trust Co.*, 165 U. S. 606. The law therefore ought to be that unless the pledgee causes the proper entry to be made on the books, he will be liable as stockholder. *Chatam Bank v. Brobston*, 99 Ga. 801; *State v. Bank of*

New England, 73 N. W. R. 153; *Harper v. Carroll*, 69 N. W. R. 610; *Moore v. Jones*, 3 Woods, 53; *Bowden v. Farmers' Bank*, 1 Hughes, 307; *Hale v. Walker*, 31 Iowa, 344; *Magruder v. Colston*, 44 Md. 349. But the rule is said to be that the pledgee may show he is not the holder (*Williams v. Am. Nat. Bank*, 85 Fed. R. 376), and that he is liable only by estoppel. *Baker v. Nat. Bank*, 86 Fed. R. 1006. But if the pledgee proved that he ordered the entry correctly made, would he escape? See cases in notes 3 and 4 of this section.

⁹ *Foster v. Lincoln*, *supra*, note 2. See *Laing v. Burley*, 101 Ill. 591, which holds the transferee liable when the transfer was not recorded.

¹⁰ *Robinson v. Beall*, 26 Ga. 17; *Cox v. Montague*, 78 Fed. R. 845; but see *Sykes v. Holloway*, 81 Fed. R. 432.

¹¹ See Illinois statutes, 1 Starr & Curtis, ch. 16a, sec. 9, and see note 1 to this section.

hares regardless of what the books show or the apparent form of the transfer.¹² A father who bought shares for his minor children and put them in their names was held to be a stockholder.¹³

§ 50. Stockholder by estoppel.—It has been said that "those persons who hold themselves or allow themselves to be held out as owners of stock are liable whether they own stock or not," and that the rules applying to ownership of national bank stock are about the same as those which apply to partnerships.¹ But the more correct statement is this: One who allows himself to be represented as owner by the books of the corporation, when he has knowledge of facts that put him upon notice that he is so held out, will not be heard to dispute his liability. Certain instances of this rule were noticed in the last section. In accordance with this rule, one who receives checks for dividends upon the stock, even though she merely indorses them without knowledge of their contents, will not be heard to deny her liability.² One who acts as an officer of a national bank, with constructive knowledge of the fact that to act as officer he must be the owner of at least ten shares, will not be heard to dispute knowledge of the fact that the books represented him to be the owner of fifty shares, even though he were in fact ignorant of the matter.³ One who acts as a stockholder with the knowledge that is imputed to him by the receipt of dividends will be held as a stockholder.⁴ He is none the less a stockholder, though as officer of the bank he

¹² *Davis v. Stevens*, 17 Blatch. 259; *Morton v. Mercer*, 71 Fed. R. 153; *Case v. Small*, 10 Fed. R. 722; *Hubbell v. Houghton*, 86 Fed. R. 547.

¹³ *Foster v. Chase*, 75 Fed. R. 797. It was put on the ground that the minors could not consent. See also *Kerr v. Urie*, 37 Atl. R. 789.

¹ *Pardee v. Cir. Judge*, in *Case v. Small*, 10 Fed. R. 722. This case is a very good instance of the recklessness of judges in using language.

The point of holding out was not involved at all, but the case was decided on the point that a man was liable as stockholder, because while the stock was held in the name of another, which other was held out as owner, he was yet the real owner.

² *Keyser v. Hitz*, 133 U. S. 138.

³ *Finn v. Brown*, 142 U. S. 56.

⁴ *Stephens v. Follett*, 43 Fed. R. 842.

took the stock in order to protect the bank;⁵ nor is he exonerated by an agreement of the bank officer that if the stock would be taken by the stockholder the bank would buy the shares at any time he wished.⁶ So a man will not be heard to say that he was a trustee of the stock and thus exempt from liability, if he knowingly permit the books to show him to be the owner;⁷ but even if the books show him to be a trustee, he will be liable if he be the real owner. Where there was an over-issue of stock, a party having bought stock of the president of a bank, who issued to the party new certificates, and, having retained the old certificates, hypothecated them, thus over-issuing the stock, it was held that the new stockholder was liable as such.⁸ As to transfer by descent or by will, see the next section.

§ 51. Executors, administrators, guardians and trustees.— As already seen, section 5152, Revised Statutes of the United States, exempts from personal liability as national bank stockholders persons holding stock as executors, administrators, guardians or trustees. The statute does not in express terms require the books to show the trust relation of the stockholder toward his beneficiary. No case has yet held that the fact cannot be shown contrary to the books of the bank. In one case it is implied that such fact could be shown.¹ It follows that if the proper orders as to the transfer have been given to the bank officers and the trustee is

⁵ *Bundy v. Jackson*, 24 Fed. R. 628. But stock held by the cashier as cashier is not chargeable against him personally. *Baker v. Old Nat. Bank*, 86 Fed. R. 1006. This case is clearly wrong unless the words "as cashier" would be notice of the trusteeship.

⁶ *Bowden v. Santos*, 1 Hughes, 158, Fed. Cas. No. 1716.

⁷ *Lewis v. Switz*, 74 Fed. R. 381; *Davis v. First Baptist Society*, Fed. Cas. No. 3633; *Welles v. Larrabee*, 36 Fed. R. 866.

⁸ *Burt v. Bailey*, 73 Fed. R. 693, 36 U. S. App. 676. This case seems to be correct, for the canceled stock ceased to be stock, its place being taken by the new stock. If the old certificates had been sold to a *bona fide* purchaser, he would not have obtained stock by the over-issue. It seems plain, too, that he could not have been held as a stockholder. *Scovil v. Thayer*, 105 U. S. 143.

¹ *Horton v. Mercer*, 71 Fed. R. 153. A pledgee is personally liable only on the ground of negligence or

not otherwise estopped, or if he has not known of the transfer to himself, in neither case could he be held liable.² The same section 5152 of the Revised Statutes of the United States makes the trust estate liable.³ Where the deceased died, being a stockholder, it would seem to be certain that, under this statute, the executor would be liable as an executor out of the funds of the estate.⁴ It has been held that the executor would be so liable even though the deceased in his life-time had made a transfer but the transfer had not been registered.⁵ But where the executor has made a transfer of the bequeathed stock to the devisee the estate can no longer be held liable.⁶ But a legatee who has received a legacy ordered to be paid to her before but actually delivered after the insolvency of the bank is liable on the testator's shares to the amount of the assets received;⁷ but the same case holds that in an action to charge the legatee with assets, the legatee would not be held where the delivery of the legacy was made before the liability of the estate as stockholder was incurred.⁸ In the case of a guardianship under a state statute it was held that the estate of those minors who had reached majority at the time of the decree could not be held in an action against the guardian.⁹

§ 52. Right of stockholder to transfer.—The right of the stockholder to have a transfer made on the books is absolute, unless the bank has a lawful claim on the shares, or

fraud or estoppel. *Lucas v. Coe*, 86 Fed. R. 972. But see *Kerr v. Urie*, 37 Atl. R. 789.

² See 3 Thompson on Corp., secs. 3194, 3198; *Lucas v. Coe*, 86 Fed. R. 972.

³ See also *Stedman v. Eveleth*, 6 Met. 114; *Mauser v. Pratt*, 101 Mass. 60; *Sayles v. Bates*, 15 R. I. 342, as to state statutes.

⁴ *Richmond v. Irons*, 121 U. S. 27; *Parker v. Robinson*, 71 Fed. R. 256, 33 U. S. App. 368; *Irons v. Manuf.*

Nat. Bank, 21 Fed. R. 197; *Wickham v. Hull*, 60 Fed. R. 326.

⁵ *Davis v. Weed*, Fed. Cas. No. 3658.

⁶ *Blackmore v. Woodward*, 71 Fed. R. 321, 18 C. C. A. 57; *Witters v. Sowles*, 32 Fed. R. 130. Where the executor failed to make a transfer to himself he was held liable as executor. *Baker v. Beach*, 85 Fed. R. 836.

⁷ *Witters v. Sowles*, *supra*.

⁸ *Witters v. Sowles*, *supra*.

⁹ *Mansur v. Pratt*, 101 Mass. 60.

unless the law forbids the transfer, or unless the parties have by agreement made the stock not transferable.¹ The bank may have an opportunity to satisfy itself of the genuineness of the transfer and of the capacity of the parties.² The bank is liable for permitting a transfer upon a forged power of attorney or upon one executed by a person not having the capacity, if the bank has notice of the want of capacity.³ The usual mode of transfer is by indorsement of the certificate by signing the power of attorney usually printed on the back of the certificate. The usual practice recognized as valid is to sign in blank, and the transferee fills in the power of attorney.⁴ The transfer is complete when made on the books whether a certificate be issued or not.⁵ If the articles of agreement permit a transfer and no legal prohibition thereof exists, the bank cannot require its own claim to be paid as preliminary to a transfer.⁶ If a transfer be enjoined by a proper court the bank cannot permit it.⁷ The national banks are not governed by the laws of the state as to transfers.⁸

§ 53. Unrecorded transfers.—No question causes more difficulty than the effect of a transfer not entered on the bank's stock book, but completed as between the parties by indorsement and delivery of the certificate. In the absence

¹ *Purchase v. New York Ex. Bank*, 3 Robt. 164; *Helm v. Swiggett*, 12 Ind. 194; *Byne v. Union Bank*, 9 Robt. 433; *Johnson v. Lafflin*, 5 Dill. 65, 103 U. S. 800.

² *Chew v. Bank of Baltimore*, 14 Md. 299.

³ *Chew v. Bank of Baltimore*, 14 Md. 299; *Pollock v. National Bank*, 7 N. Y. 274; *Peck v. Bank of America*, 16 R. I. 710. It has been held that a bank is not liable for a guardian's transfer in fraud of his ward's rights. *Bank of Vir. v. Craig*, 6 Leigh, 399.

⁴ *Commercial Bank v. Cart-*

wright, 22 Wend. 348; *Lee v. Citizens' Bank*, 5 Ohio Dec. 21.

⁵ *Agricultural Bank v. Wilson*, 24 Me. 273; *Keyser v. Hitz*, 133 U. S. 138; *National Bank v. Watsontown Bank*, 105 U. S. 217.

⁶ *Bank of Attica v. Manuf. & Trad. Bank*, 20 N. Y. 501. The same rule applies to national banks. *Bullard v. Bank*, 18 Wall. 589, overruling several circuit courts.

⁷ *Purchase v. New York Ex. Bank*, 3 Robt. 164.

⁸ *Scott v. Pequonnock Nat. Bank*, 15 Fed. R. 494. *Contra*, *Hobbs v. Western Nat. Bank*, Fed. Cas. 6551a.

of any regulation as to recording transfers, the transfer is complete when completed between the parties. But where the statute provides for a registration of the transfer on the books of the company, as in the national bank act, or when the by-laws provide for a registration, or, what is the same thing,¹ when the certificates on their face are made transferable on the books of the company, it is conceded that as between the parties a complete title passes by an unrecorded transfer. On principle the legal title would not pass until the entry was recorded, because of the effect of the provision for registering. An execution or attachment lien put upon the shares standing in the name of the transferrer would, when completed by a sale, relate back to the date of the levy. And the question is, would it take precedence of the rights of the unrecorded transferee? Now it is conceded that the certificates are not negotiable under the law merchant by all the well-considered authorities. Therefore the attachment or execution lien being entered on the books, when completed by sale makes a legal title as of the date of the levy, when the prior transfer being unrecorded the transferee had but an equitable title. The purchaser at the execution sale becomes a *bona fide* purchaser for value if the creditor and the bank had no notice of the unrecorded transfer at the date of the levy. If the creditor or the bank had notice of the equity of the unrecorded transferee, neither the creditor as purchaser at the sale nor any other purchaser at the sale would be a *bona fide* purchaser.² Assuming, then, that the creditor and the bank had no notice, the purchaser obtains a legal title by the sale, which legal title is that of a *bona fide* purchaser. The conclusion follows that when equities are equal, as they are in case of *bona fide* purchasers, the legal title will prevail. There is no escape, then, from the

¹ State v. McIver, 2 S. C. 25; Mechanics' Bank. Asso. v. Mariposa Co., 3 Robt. 395. In this case it is amusing to compare the brief of the attorney for the defendant, Wm. M. Evarts, with the opinion of the

court. The latter is a *verbatim* copy of the former, but there are no quotation marks.

² Farmers' Gold Bank v. Wilson, 58 Cal. 400; Telford Co. v. Gerhab, 13 Atl. R. 90.

conclusion, on principle, that a levy made without notice of an unrecorded transfer, either by the creditor or the bank, gives a good title as against an unrecorded transfer, where the statute does not make the legal and equitable title in bank stock to pass upon an unrecorded transfer, but where a transfer to complete the title is provided for by the statute or a by-law or by the certificates. But many courts have refused to recognize this plain conclusion out of a desire to make corporate stock more readily transferable. So that two very competent text writers have taken absolutely contrary ground upon this question.³ The author believes the one right in his conclusion as a legal proposition, although he does not state the true grounds; but the weight of the authority, or *dictum* at least, seems to be with the other. The cases relating to banks will be found stated in the note appended below.⁴ A transfer, of course, after a levy would confer no title on the transferee.⁵ The corporation has sometimes a difficult duty to perform when a certificate for shares is outstanding and the purchaser presents a certificate of sale under an execution. Unless the corporate

³ See 2 Thompson on Corporations, secs. 2397, 2409-2421; also 30 Am. Law Rev. 223, and 2 Cook on Corporations, secs. 486, 491; also see 12 Ry. & Corp. L. J. 145.

⁴ In favor of the attachment or execution: Koons v. First Nat. Bank, 89 Ind. 178, *semble*; Johnson v. Lafin, 103 U. S. 800, *semble*. National Bank v. Watsontown Bank, 105 U. S. 217, and Union Bank v. Laird, 2 Wheat. 390, recognize legal title passes by transfer on books. Under prohibitory statute see Pendergast v. Bank of Stockton, 2 Sawy. 116; Skowhegan Bank v. Cutter, 49 Me. 315. See also Fort Madison Co. v. Batavian Bank, 71 Iowa, 270; Comm. Nat. Bank v. Farmers' Bank, 82 Iowa, 192; Dutton v. Connecticut Bank, 13 Conn. 493;

Fisher v. Essex Bank, 5 Gray, 373; People's Bank v. Gridley, 91 Ill. 457; Berney Nat. Bank v. Pinckard, 87 Ala. 577. Against the attachment or execution: Continental Nat. Bank v. Eliot Nat. Bank, 17 Fed. R. 369. This case makes the mistake of not seeing that a legal title passes by the execution sale. If it does, the legal title without notice is better than a prior equitable title. Hazard v. Nat. Ex. Bank, 26 Fed. R. 94; Doty v. First Nat. Bank, 3 N. Dak. 9; Nicollet Nat. Bank v. City Bank, 38 Minn. 85; Broadway Bank v. McElrath, 13 N. J. Eq. 24; Clark v. German Security Bank, 61 Miss. 611; Bank v. Richards, 74 Mo. 77, *semble*; 6 Mo. App. 454.

⁵ 2 Cook on Corp., sec. 486.

officers know that the certificate is still in the hands of the judgment debtor, the corporation acts at its peril in making a transfer. Although in the particular locality the execution sale gives a good title against the unregistered transferee, yet the corporate officers cannot know whether the creditor had notice of the transfer, even though they know that the corporation has had no notice. The situation is still worse where the unregistered transfer gives both a legal and equitable title. The corporation can only protect itself by refusing to transfer except under a judgment of the court. But the party demanding the transfer may sue the corporation in conversion instead of in equity or *mandamus*. If the stock is fluctuating in value the corporation is exposed to a further peril of responding for the value of the stock. On principle it would seem that a corporation which is prohibited by law from acquiring its own stock could not be sued in trover, because the satisfaction of the trover judgment transfers title in the stock to the corporation. Yet this probably is not the law, since the corporation is always liable in tort, whether the act be prohibited by law or not. If the transfer be made under order of a competent court, the corporation is released from liability.⁶ But this rule is not in accordance with the general principle of law that a judgment *in personam* binds only the parties thereto. The corporation can always be protected in some measure by the exaction of security, which the court has the power to require. But in view of these difficulties, as well as of the fact that the validity of an unregistered transfer opens up a wide field for perjury (by enabling a party to make a transfer after the levy and then antedating it in order to beat the levy), the policy, whether put in the form of statutes or decisions, of recognizing unregistered transfers as conveying more than an equitable title, is exceedingly questionable.⁷

⁶ *Friedlander v. Slaughter House* Chapman v. New Orleans Gas Co., 31 La. Ann. 523. See 1 Cook 4 La. Ann. 153.

on Corp., secs. 359, 388; 2 Cook on ⁷ It will be found that in many of the cases courts have paid little attention to fundamental principles.

Corp., sec. 489. See also *Smith v. Northampton Bank*, 4 Cush. 1;

Still further difficulties arise in deciding as to which issue is good stock, where a transfer has been made with a certificate outstanding. If the unregistered transfer be recognized as binding on the corporation, the stock issued without a surrender of the outstanding certificate is a nullity. But if the new stock is recognized as good stock, because issued pursuant to a sale which amounts to a judgment *in rem*, *e. g.* a tax sale,⁸ or a forfeiture for non-payment of assessment, or, in some jurisdictions, a transfer under an order of the court in an action to which the unregistered transferee was not a party, or because of a judicial sale which is held in the particular jurisdiction to bind the unrecorded transferee, in all such cases the new stock becomes the valid stock and the outstanding certificates represent over-issued and void stock.⁹

§ 54. Bank's lien on shares.—It is settled that a national bank cannot have a lien upon its own shares for claims against its stockholders.¹ But in the case of other banks such a lien is provided for in some cases by the charter or the governing statute, in others by a by-law, in others by the words of the stock certificates.² In the absence of such a provision the bank can have no lien.³ The lien where permitted does

If stock is transferable on the books, the phrase must mean that by a transfer on the books the title passes, and not till then. This is the legal title, and the unregistered transferee has an equitable title until transfer on the books.

⁸Smith v. Northampton Bank, 4 Cush. 1.

⁹See 1 Cook on Corp., secs. 284, 388.

¹Bullard v. Bank, 18 Wall. 589. See also Bank v. Lanier, 11 Wall. 369; Evansville Nat. Bank v. Met. Nat. Bank, 2 Biss. 527. But in Maine it appears that the bench and bar have not access to any report of recent date, because that court lately held that a national

bank could have a lien on its own shares. Bath Sav. Inst. v. Sagadahoc Nat. Bank, 36 Atl. R. 996. The court cited Knight v. Bank, in 3 Cliff., expressly overruled by the Supreme Court, Judge Clifford dissenting, and Bank v. Laird, 2 Wheat. 390. Probably the Maine court preferred to follow Judge Clifford.

²Jennings v. Bank of Cal., 79 Cal. 323; Waln v. Bank of N. America, 8 S. & R. 89; Vansands v. Bank, 26 Conn. 144.

³Merchants' Bank v. Shouse, 14 Wkly. Notes Cas. 133; Dana v. Brown, 1 J. J. Marsh. 304. See also Neale v. Janney, 2 Cranch C. C. 86; Duncan v. Biscoe, 7 Ark. 175.

not extend to dividends upon the stock.⁴ Where the lien is provided for by charter or by general statute, which is, of course, a part of the charter, the unregistered transferee of stock takes subject to the lien,⁵ and the bank may refuse to make a transfer until its claim is satisfied.⁶ Such a lien is general in its nature. It covers all indebtedness of every kind of the stockholder to the bank — overdrafts,⁷ individual and partnership liabilities,⁸ liability as principal debtor,⁹ whether secured by indorsement or not,¹⁰ contingent liability as an indorser.¹¹ But the lien does not reach the indebtedness of an intermediate assignee who is not entered on the books,¹² nor the indebtedness of a stockholder contracted after notice to the bank of a transfer by him.¹³ It has been held that the lien does not give the power to sell.¹⁴ The lien seems to apply also on the principle of subrogation for the benefit of the sureties or indorsers of the debtor.¹⁵ This lien the bank may waive by permitting a transfer without insisting upon its right.¹⁶ One aberrant case has held that the lien is waived by taking security;¹⁷ another, that it is

⁴ *Brent v. Bank of Washington*, 2 Cranch C. C. 517.

⁵ *Union Bank v. Laird*, 2 Wheat. 390; *Mohawk Nat. Bank v. Schenectady Bank*, 151 N. Y. 665; *Rogers v. Huntingdon Bank*, 12 S. & R. 77; *Farmers' Bank v. Iglehart*, 6 Gill, 50; *Hammond v. Hastings*, 134 U. S. 401; *Reese v. Bank of Commerce*, 14 Md. 271.

⁶ *Leggett v. Bank of Sing Sing*, 24 N. Y. 283; *Downer v. Zanesville Bank*, Wright, 477.

⁷ *Reese v. Bank of Commerce*, 14 Md. 271.

⁸ *Franklin Bank v. Comm. Bank*, 5 Ohio Dec. 339; *Mechanics' Bank v. Earp*, 4 Rawle, 384.

⁹ Even if pledged for other indebtedness of the stockholder to the bank. *In re Peebles*, 2 Hughes, 394.

¹⁰ *In re Morrison*, Fed. Cas. No. 9839.

¹¹ *Leggett v. Bank of Sing Sing*, 24 N. Y. 283; *Bank of Ky. v. Bonnie*, 43 S. W. R. 407; *Brent v. Bank of Washington*, 10 Pet. 596. *Contra*, *Reese v. Bank of Commerce*, 14 Md. 271.

¹² *Helm v. Swiggett*, 12 Md. 194.

¹³ *Nesmith v. Washington Bank*, 6 Pick. 324; *Conant v. Reed*, 1 Ohio St. 298.

¹⁴ *Tete v. Farmers' Bank*, 4 Brewst. 308. *Contra*, *In re Farmers' Bank*, 2 Bland, 394; *Hammond v. Hastings*, 134 U. S. 401.

¹⁵ *Klopp v. Lebanon Bank*, 46 Pa. 88.

¹⁶ *Nat. Bank v. Watsontown Bank*, 105 U. S. 217; *Hill v. Pine River Bank*, 45 N. H. 300; *Presbyterian Cong. v. Carlisle Bank*, 5 Barr, 345.

¹⁷ *McLean v. Lafayette Bank*, 3

waived by issuing certificates without making some mention of the right thereon,¹⁸ an absurdly wrong conclusion. Where a bank releases its lien for a specified time its lien is postponed to any claim created in the released period.¹⁹ Where the lien is created by a by-law of the bank, a stockholder is charged with notice of the by-law.²⁰ But where the by-law provided that the certificates of stock should contain on their face notice of the provision in the by-law for the bank's lien that no transfer should be made by any stockholder indebted to the company, and the certificates of stock contained no such notice, and the transferee had no notice of the by-law, it was held that he took by an assignment a good title free from any lien of the bank.²¹ Where the by-law prevented a transfer so long as the holder of the stock was in arrears or in any form indebted to the bank, the strict construction was adopted that arrears meant unpaid calls, and other indebtedness meant indebtedness other than the stock subscription, and that, therefore, a transfer could not be refused where no call had been made which remained unpaid and where no other indebtedness existed.²² Where the statute provided that holders of bank shares might transfer them unconditionally unless otherwise agreed in the articles of association, a lien in favor of the bank cannot be created by a by-law.²³ The doctrine has been ventured by another court that a by-law of this kind does not bind judgment creditors of the stockholders, but that position is, of course, untenable.²⁴ The bank has no lien in the nature of

McLean, 587; *Fitzhugh v. Bank*, 3 T. B. Mon. 126, *semble*.

¹⁸ *Lee v. Citizens' Nat. Bank*, 2 Cin. R. 298, 5 Ohio Dec. 21. *Contra*, *Reese v. Bank of Commerce*, 14 Md. 271.

¹⁹ *Bank of America v. McNeil*, 10 Bush, 54.

²⁰ *Tete v. Farmers' Bank*, 4 Brewst. 308.

²¹ *Bank of Holly Springs v. Pinson*, 58 Miss. 421. This case is certainly wrong. Both transferrer and

transferee were charged with notice of the by-law. How could either be prejudiced by a failure to state the fact on the certificate? But see note 18 to this section.

²² *Kahn v. Bank of St. Joseph*, 70 Mo. 262.

²³ *Bank of Attica v. Manuf. Bank*, 20 N. Y. 501.

²⁴ *Byron v. Carter*, 22 La. Ann. 98; *Sewell v. Lancaster Bank*, 17 S. & R. 285.

a set-off to apply the dividends accruing upon stock after the death of the stockholder upon notes indorsed by him.²⁵

§ 55. Statutory prohibition of transfers.—Where the statute prohibits a transfer, as, for example, before the whole amount of subscription has been paid in, no legal transfer of the stock can be made until it is fully paid.¹ So where the right of the subscriber to his stock is forfeitable for failure to pay an instalment or call, no right in the stock can be transferred before the instalment is paid, even though the assignee paid the instalment.²

§ 56. Prohibition of transfers by agreement.—There seems to be authority for the proposition that the corporators or shareholders may agree not to dispose of their stock for a certain time, and that such a contract may be specifically enforced by a court of equity.¹ A court has specifically enforced an agreement of a stockholder to sell to other stockholders.² But the enforcement of such a contract belongs to that receptacle which has been made the custodian of many remarkable decisions, to wit: the discretion of the court.³ But such contracts do not bind a *bona fide* purchaser,⁴ nor do they prevent a legal title in the stock from passing to the transferee, although he had notice.⁵ But a by-law of the corporation cannot restrain the absolute right of the stockholder to transfer his stock.⁶ If the provision against alienability is incorporated in the articles of agreement, it would seem to follow that it would be valid under some of the above decisions, which have entirely lost sight of the general principle of law that any restraint on alienation of real or per-

²⁵ *Brent v. Bank of Washington*, 2 Cranch C. C. 517.

¹ *Merrill v. Call*, 15 Me. 428.

² *Coleman v. Spencer*, 5 Blackf. 195. This case cannot be considered sound. See also 2 Cook on Corp., sec. 621a.

¹ *Williams v. Montgomery*, 148 N. Y. 519.

² *Jones v. Brown* (Mass.), 50 N. E. R. 648.

³ *Re Argus Co.*, 138 N. Y. 557.

⁴ *Brinkerhoof-Farris Co. v. Home Lumber Co.*, 118 Mo. 447.

⁵ See 2 Cook on Corp., sec. 621a, note 2.

⁶ 2 Cook on Corp., sec. 621a.

sonal property held in absolute ownership is void.⁷ The obvious expedient of putting the stock in the hands of a trustee does not restrain the alienation by the beneficiary of his equitable interest.⁸ Yet if the stock is put in the hands of a trustee, who is given the voting power, it is probable that some courts would refuse to compel the trustee to transfer to the real owner.

§ 57. Right of stockholders in bank.—A state statute granting to stockholders access to and the right of inspection of the books is binding upon national banks, and does not conflict with sections 5240 and 5241 of the Revised Statutes.¹ Stockholders in banks have the usual remedies as against the directors to prevent a breach of duty.² In the case of state banks the United States courts are governed by the rules as to their jurisdiction laid down in *Harves v. Oakland*, 104 U. S. 450, and the rule of the Supreme Court in pursuance thereof.³ The remedies to inquire into elections and abuse of powers given by statute do not call for particular mention.⁴

§ 58. Liabilities of stockholders.—The first and original liability of a stockholder is that upon his stock subscription, to pay the full amount subscribed. But in addition to this liability various statutes have added an additional liability to stockholders for debts of the corporation. It is, of course, a matter of common legal knowledge that no liability upon a stockholder as such, except for the stock subscription, exists at common law. But as a general rule statutes have

⁷ See Gray, *Restraints on Alienation*, sec. 105 et seq.

⁸ If this device was taken merely to destroy the alienability, no court ought to enforce it.

¹ *Winter v. Baldwin*, 89 Ala. 483. Compare as to the general right to inspect, *Hatch v. City Bank*, 1 Rob. (La.) 470; *Cockburn v. Union Bank*, 13 La. Ann. 289.

² *Reese v. Bank of Mont. Co.*, 31 Pa. 78; *Manderson v. Comm. Bank*, 28 Pa. 379; *Dodge v. Woolsey*, 18 How. 331.

³ *Quincy v. Steel*, 120 U. S. 245; *Dimpfell v. Railroad Co.*, 110 U. S. 211.

⁴ See *Albert v. State*, 65 Ind. 413; *Wiltz v. Peters*, 4 La. Ann. 339.

imposed additional liabilities upon bank stockholders. And these statutes will doubtless be held to apply to all corporations with banking powers, whether they are named banks or trust companies, but the double liability would only apply to that part of their business transactions which was that of a bank. Sometimes the stockholders of the bank are made liable for its debts upon insolvency or dissolution. In one instance found in *State Savings Bank v. Foster*, 76 N. W. R. 499 (Mich.), the stock liability is for depositors, but not other creditors. At other times they are made liable to a certain amount for debts contracted while they were stockholders, regardless of a transfer. By other statutes the stockholders existing at the time suit is brought are made liable. In some instances both the stockholders when the debt was contracted, and those existing at the time suit is brought, are made liable. There have been in times past statutes imposing on stockholders in state banks of issue a particular liability upon the circulating notes of the bank. Under our national banking system the notes of national banks are fully secured. But the stockholders of national banks are made liable for an amount equal to the amount of their stock in addition to the stock subscription for the debts of the bank. This is the common form of liability for bank shareholders. Only those who are stockholders at the time when insolvency impends are liable under the national bank act. There are yet other statutes which make stockholders liable for certain acts of the corporation, which liability is something in the nature of a penalty. It is not the purpose of the writer to examine this subject minutely, for it is so complicated with general corporation law that it would swell this chapter beyond reasonable limits. The subject has been fully treated by excellent authorities.¹

§ 59. Liability on stock subscription.—The engagement which a stockholder makes when subscribing for stock is to pay the amount of his stock subscription. This engagement

¹See 3 Thompson on Corp., secs. extensive use of a learned note, 3 2925-3843, who must have made an Am. St. R. 806.

is a contract with the corporation which becomes binding as soon as the corporation is formed. This capital fund must be paid to the corporation. If the statute requires payment in specie it must be so made.¹ If the law of the particular jurisdiction permits a payment in something else than money, payment may be so made.² The contract may be avoided, it is true, on the ground of fraud if the subscriber is not estopped from making that defense.³ But conceding a valid subscription, the subscribed capital becomes the security of the creditors, and the stockholders are powerless to make any arrangement among themselves relieving them from this liability.⁴ Nor can this capital stock be divided up among the stockholders to the prejudice of the creditors of the corporation.⁵ If a stockholder has given a note to the corporation in payment of his subscription, he cannot defend against it on the ground that the corporation had no power to take it.⁶ Nor can a stockholder escape this liability by showing that the bank was not properly organized;⁷ but it has been held that a violation of law in organizing the bank would be pleadable against this stock subscription.⁸ Even this decision is wrong unless it is explainable on the theory that it was a contract which the law forbade. The state can be compelled to meet this liability.⁹ It will not avail the stockholder to show that he has paid the notes of the bank up to the extent of his liability,¹⁰ nor that he has paid a judgment against

¹ King v. Elliot, 5 Smedes & M. 428, on a statutory implication.

² See § 19, *supra*.

³ See 3 Am. St. R. 824 et seq., in note; Bissell v. Heath, 98 Mich. 472; In re Empire City Bank, 6 Abb. Pr. 385, and see § 48, *ante*.

⁴ Sagory v. Dubois, 3 Sandf. Ch. 466; Palmer v. Lawrence, 3 Sandf. 161; Dayton v. Borst, 7 Bosw. 115.

⁵ Wood v. Dummer, 3 Mason, 308; Bank of St. Mary's v. St. John, 25 Ala. 566, a case where the directors and all who participated were held liable for the money and for profits.

⁶ Finnell v. Sandford, 17 B. Mon. 748; Farmers' Bank v. Jenks, 7 Metc. 592.

⁷ Palmer v. Lawrence, 3 Sandf. 161.

⁸ North Missouri Co. v. Winkler, 33 Mo. 354. If it had been the statutory liability, this defense would have been irrelevant beyond a doubt.

⁹ Curran v. Arkansas, 15 How. 304. See note to § 48, *ante*.

¹⁰ Marsh v. Burrows, 1 Woods, 463. See § 315, notes 15 and 16, *post*.

himself as a partner responsible for the bank's debts.¹¹ If the subscriber sells his stock to the bank he is still liable,¹² but it has been held otherwise. But a valid transfer completed and assented to by the bank releases the original subscriber, unless a statute makes him liable.¹³ The authorities heretofore cited as to the effect of a transfer when not in good faith or for the purpose of avoiding liability are all in point here.¹⁴ The right to call in unpaid stock subscriptions, however, it has been held in a case of doubtful authority, may be taken away by statute as to debts contracted after the statute was passed.¹⁵ The ruling shows the result of foolish schemes for state banking.

§ 60. Statutory modifications.—Some instances occur where the statute makes the original subscriber a guarantor of the payment of the stock subscription by a transferee.¹ Statutes which were works of supererogation have been passed declaring the stockholders liable for unpaid subscriptions. This is merely declaring the liability that the law already imposed. Courts have in some instances construed statutes making the stockholder liable for the amount of his stock to be declaratory of a liability to the amount of the original subscription, but not a double liability. These statutes have some bearing upon the matter of remedy.¹

§ 61. Remedies upon stock subscriptions.—The unpaid stock subscription belongs to the corporation, and the method

¹¹ *Bates v. Lewis*, 3 Ohio St. 459. The payment was after suit brought.

¹² *In re Reciprocity Bank*, 22 N. Y. 9. *Contra*, *Robinson v. Bank of Darien*, 18 Ga. 65. This latter bank was well named. See 10 Macaulay's England, 185.

¹³ *Cowles v. Cromwell*, 25 Barb. 413.

¹⁴ See §§ 49, 50, *ante*.

¹⁵ *Robinson v. Bank of Darien*, 18 Ga. 65. If it is a contract this case

is wrong. See *Hawthorne v. Calef*, 2 Wall. 10, which holds the double liability to be an unrepealable contract. But the original stock subscription must be a contract between all the stockholders. It is mere folly to say the legislature can vary private contracts.

¹ *Marr v. Bank of West Tennessee*, 4 Lea, 578; *Harper v. Carroll*, 69 N. W. R. 610 (Minn.).

¹ See next section.

of obtaining the subscription is for the proper authority in the corporation to make a call. If the stockholder does not pay he is suable at law upon his contract; the form of the action, since the contract is a specialty, is either debt or covenant at common law. But if the corporation will not make the call, a creditor's bill lies in favor of the creditor who has exhausted his remedy against the corporation,¹ or where the pursuit of that remedy would be useless.² *Mandamus* also lies in some jurisdictions, and on principle wherever the common law is in force, to compel the proper authorities of the corporation to make a call.³ But this remedy is cumbersome and little used, and in some jurisdictions is practically denied.⁴ Where the unpaid subscription is due by call and unpaid, the creditor may garnish the corporation,⁵ and in one state even when not due,⁶ but this ruling is anomalous.⁷ But the remedy in equity is complete, and the court, where the assets are insufficient, will make a call for the unpaid subscription and may compel discovery from the stockholders. The judgment against the corporation is conclusive upon the stockholders. Since the unpaid subscriptions are an asset of the corporation, they pass to the assignee or receiver, who may sue upon them in equity, joining all the stockholders or some of them.⁸ After a receiver has been appointed, a repeal of the statute under which he was appointed will not prevent his prosecution of the suit.⁹ But where the remedy is pursued by the creditor, it is sometimes desirable that he proceed at law on account of his chance for a priority. In such case the law of the particular jurisdiction must settle the remedy. Where the *statute* enforces

¹ See 3 Am. St. R. 810 et seq., in note.

² See last citation.

³ *Patterson v. Lynde*, 112 Ill. 196, for foreign corporation.

⁴ *Ward v. Griswold Co.*, 16 Conn. 593; *Dalton R. R. Co. v. McDaniel*, 56 Ga. 191.

⁵ See 3 Am. St. R. 807, in note; but see note 7, *infra*.

⁶ *Robertson v. Noeninger*, 20 Ill. App. 227. See *Gasch v. World's Fair Excursion and Transp. Co.*, 59 Ill. App. 391.

⁷ *Lane's Appeal*, 105 Pa. 49.

⁸ *Robinson v. Carey*, 8 Ga. 527. He may sue at law if a call has been made.

⁹ *Farmers' Bank v. Jenks*, 7 Met. 592.

the liability for unpaid subscriptions and makes the stockholder liable therefor, it would seem on principle that the liability created was a legal liability and no longer cognizable solely in equity. So one case has held,¹⁰ but other courts have decided otherwise.¹¹

§ 61a. Other questions as to this liability.—The right of the creditor to proceed by bill in equity accrues, of course, when he has exhausted his remedy at law. But where the bank has refused payment, or has become insolvent, the right accrues at once.¹ In a suit by a creditor in equity, the corporation is a necessary party to the action, since the unpaid subscription belongs to it.² When the remedy against the bank is barred, it is also barred against the stockholder,³ and the statute begins to run from the accrual of the liability.⁴ When the bank's remedy against the stockholder is barred, the creditor is also barred from proceeding against him.

§ 62. Nature of statutory liability for debts.—The various liabilities for debts of the bank created by statute against bank stockholders, whatever the nature of them may be, whether primary or secondary, whether joint or several, have one feature in common, to wit: they are all contractual. Ordinarily such a contractual relation would be one *quasi*-contractual in its nature;¹ and as pointed out by the

¹⁰ *Smith v. Londoner*, 5 Cal. 365, citing two Illinois cases. See also *Stephens v. Fox*, 83 N. Y. 313, and cases cited.

¹¹ *Patterson v. Lynde*, 106 U. S. 519, citing an Oregon case. The court fails to see that the statute creates a *quasi*-contract where before only a remedy in equity existed, and therefore gives a remedy at law. The cases in note 10, *supra*, are therefore correct, unless the bank was insolvent, when the statute in some states is held to re-

quire equal distribution of the assets.

¹ *Wood v. Dummer*, 3 Mason, 308.

² *Wood v. Dummer*, *supra*.

³ *Fleischer v. Rentchler*, 17 Bradw. 402.

⁴ *Godfrey v. Terry*, 97 U. S. 171; *Baker v. Atlas Bank*, 9 Metc. 182; *Long v. Bank of Yanceyville*, 90 N. C. 405; *Amer v. Armstrong*, 6 Pa. Co. Ct. R. 392. These cases, while not in point as to the facts, are in point as to the principle.

¹ This distinction between con-

Supreme Court of the United States, a *quasi*-contract is not a contract that is protected by the constitutional prohibition against the states of impairing the obligation of a contract.² The distinction becomes of importance in case it is desired to issue a writ of attachment. Many statutes permit a writ of attachment to be issued upon a cause of action arising out of a contract, express or implied. Such a contract to be implied must be one implied as an actual agreement of the parties, not one implied contrary to the intention of the parties, or one arising from a statute as a *quasi*-contract. Therefore if this statutory liability is a *quasi*-contract in those jurisdictions just spoken of, the writ of attachment would not lie upon it, nor would it be protected against a law taking the liability away as to future contracts. But it has been erroneously decided by the highest authority that this liability of stockholders is a genuine contract, because, it is said, being a provision of law, it is as if written into the articles of agreement of the corporation as a part thereof.³ It has been held that it cannot be repealed by a state statute,⁴ because the obligation of a contract would be impaired. This decision was made through a total misconception. The

tract and *quasi*-contract is one that courts have much confused, but it is important. See Keener, *Quasi-Contract*, ch. I. Prof. Wigmore, in his classification, 25 *Am. Law Rev.* 695, ignores customary and statutory duties as part of the law of *quasi*-contract. It was even held expressly by a court of high authority that this liability was not one of contract, but was *quasi*-contractual. *First Nat. Bank v. Hawkins*, 79 *Fed. R.* 51 (C. C. A.). See *Amer v. Armstrong*, 6 *Pa. Co. Ct. R.* 392.

² *Louisiana v. New Orleans*, 109 *U. S.* 285.

³ *Hawthorne v. Calef*, 2 *Wall.* 10. This case was argued by eminent counsel, but the idea of *quasi*-contract was not even suggested. See

also *Corning v. McCullough*, 1 *Comst.* 47. But the court in *First Nat. Bank v. Hawkins*, 79 *Fed. R.* 51, held it a *quasi*-contract, in seeming ignorance of this decision. The holding in the case just cited was, however, perfectly correct, but has been reversed in the Supreme Court. *First Nat. Bank v. Hawkins*, 174 *U. S.* 364.

⁴ *Hawthorne v. Calef*, *supra*. While the decision may be correct, the reasons given for it are perfectly erroneous. The statutory liability is a *quasi*-contract, but when the obligation has once arisen it is property, and a statute cannot abolish it, because the act would be confiscation. See § 128, note 10, *post*.

obligation may be enforced in another state, because it is not penal in its nature.⁵ It survives against the personal representative of a deceased stockholder.⁶ It covers all manner of debts and liabilities that fall within the terms of the statute.⁷ The word "debts," in these statutes, seems to mean every kind of a contractual claim; but a claim for a tort does not become a debt because it is reduced to a judgment, which is ordinarily called a debt of record.⁸ These decisions are erroneous, because founded on a misconception of a *quasi*-contract. There are some liabilities against stockholders which are penal in their nature and not enforced in other states.⁹ The remedy of special nature provided will not be applied in another state.¹⁰

§ 63. General character of liability.—The statutes are so varied, and the character of the liability established so different, that it is difficult to attain any general rule. But the power of the legislature to impose the liability as to future debts exists wherever the right to alter the charter has been reserved,¹ and it seems that even without such a power reserved the legislature can impose the liability upon the stockholders as a condition to the corporation further doing business, which imposition is valid as to all the stockholders who continue in the corporation,² certainly as to those who accept the condition.³ As to the rule of construction to be adopted for such statutes, some states have held they must

⁵ *Flash v. Conn*, 109 U. S. 371; *Nimic v. Iron Works*, 25 W. Va. 184. But see *Post v. Toledo R. R. Co.*, 144 Mass. 341, which is put upon grounds of procedure. *Lawler v. Burt*, 7 Ohio St. 340, affirms that the liability is in tort.

⁶ *Richmond v. Irons*, 121 U. S. 27; *Wickham v. Hull*, 60 Fed. R. 326. But see *New England Bank v. Newport Steam Fac.*, 6 R. I. 154.

⁷ See 3 Am. St. R. 844, in note.

⁸ See last citation.

⁹ *Sayles v. Brown*, 40 Fed. R. 8.

¹⁰ *Christensen v. Eno*, 106 N. Y. 97; *Lowry v. Inman*, 46 N. Y. 119.

¹ *Sherman v. Smith*, 1 Black, 587; *Allen v. Walsh*, 25 Minn. 543; *Gray v. Coffin*, 9 Cush. 192; *Heidenger v. Spruance*, 101 Ill. 278.

² *U. S. Trust Co. v. U. S. Fire Ins. Co.*, 18 N. Y. 199; *In re Reciprocity Bank*, 22 N. Y. 9; *In re Oliver Lee & Co.'s Bank*, 21 N. Y. 9.

³ *Owen v. Purdy*, 12 Ohio St. 73.

be strictly construed,⁴ others liberally;⁵ but the better rule seems to be that they should be given a reasonable construction.⁶ There seems to be a general agreement among the different states upon the proposition that the liability incurred by the stockholders is not that of sureties or guarantors,⁷ although in most cases,⁸ though not in all,⁹ an ascertainment by some officer, sometimes a sheriff with an execution, sometimes a comptroller of the currency, is required that the assets of the corporation are insufficient to pay the debts of the corporation. The liability, however, is that of principal debtor,¹⁰ except in a few instances where there have been anomalous rulings.¹¹ This liability, too, the creditor may waive, either by his express contract or by conduct.¹² The liability cannot be created by a by-law or by the form of the certificates, but stockholders may make themselves so liable by conduct amounting to an estoppel, or by an express agreement.¹³

§ 64. Joint or several liability.—Whether the liability created by these statutes is joint or several has an important bearing upon the remedy to be adopted in order to enforce it. It seems plain that where the statute places no limit upon the extent of the liability it is joint.¹ But wherever

⁴ Appeal of Gunkle, 48 Pa. 13; Baker v. Atlas Bank, 9 Met. 182.

⁵ See 3 Am. St. R. 836.

⁶ See last note.

⁷ See 2 Morawetz on Corp., sec. 879; Hewett v. Adams, 54 Me. 206; Sterne v. Atherton, 51 Pac. R. 791 (Kan.).

⁸ Hastings v. Barnd, 75 N. W. R. 49; McLaughlin v. O'Neil, 51 Pac. R. 251; Pickering v. Hastings, 76 N. W. R. 587.

⁹ State v. Union Stock Yards Bank, 70 N. W. R. 752 (Iowa); Barnes v. Arnold, 51 N. Y. Supp. 1109.

¹⁰ Hobart v. Johnson, 8 Fed. R. 493; Irons v. Manuf. Nat. Bank, 21 Fed.

R. 197; Fuller v. Ledden, 87 Ill. 310; Coleman v. White, 14 Wis. 762; s. c., 80 Am. Dec. 797; Schalucky v. Field, 124 Ill. 617; s. c., 7 Am. St. R. 397; Mitchell v. Beckman, 64 Cal. 117.

¹¹ Wilson v. Book, 13 Wash. 676. But this opinion amounts only to saying that the assets must be exhausted. See 3 Am. St. R. 851, in note.

¹² New England Bank v. Newport Steam Fac., 6 R. I. 154; Van Horn v. Whitlock, 26 Wend. 43.

¹³ See 3 Am. St. R. 835, in note.

¹ Shafer v. Moriarity, 46 Ind. 9; Deming v. Bull, 10 Conn. 409.

there is a limit placed upon the liability, as, for example, where it is in proportion to the stock up to a certain amount, or where it is double the value of the stock held, the liability must be a several one.² The reason for this distinction is plain: in the first case, unless the liability be joint, one stockholder could be sued for all the debts of the institution; but in the second case, the liability being of a varying amount as to different stockholders, it must be several. It is true that some statutes declare that the stockholders shall be jointly and severally liable, or as partners,³ yet, if the liability is in proportion to the stock, it must be several. Therefore, as to any of these statutes, it is a confusion of terms to say that the liability is that of partners,⁴ even where the statute makes the corporators liable for all debts to the amount of their stock, regardless of any exhaustion of the assets.⁵ Since the liability is generally several, if it is ratable there can be no increased liability thrown upon one stockholder by reason of the fact that there are insolvent stockholders,⁶ although if the liability is joint that result is obtained, in effect, by a judgment against the joint obligors, and a levy of execution upon those able to respond. A distinction is made in these statutes between a provision rendering a stockholder individually liable to an amount equal to his stock, and a provision making the stockholders responsible to the amount of their stock equally and ratably, or not one for the other.⁷

² Kennedy v. Gibson, 8 Wall. 498; United States v. Knox, 102 U. S. 422.

³ See Thompson v. Meisser, 108 Ill. 359. See note 7, *infra*.

⁴ 2 Morawetz on Corp., sec. 878. See Coleman v. White, 14 Wis. 700.

⁵ Culver v. Bank, 64 Ill. 528. See also Matthews v. Albert, 24 Md. 527; Norris v. Johnson, 34 Md. 485.

⁶ United States v. Knox, 102 U. S. 422; Crease v. Babcock, 10 Met. 524. This must be so where the statute

is held to impose a liability equally and ratably upon stockholders. See *In re Hollister Bank*, 27 N. Y. 393.

⁷ Dupee v. Swigert, 127 Ill. 494. The reason is that the first provision makes the stockholder liable for that amount regardless of the situation of the other stockholders, but the second provision requires a computation of the whole liability and a division thereof according to the amount of stock held.

§ 65. **Who can enforce liability.**—This statutory liability, being imposed for the benefit of creditors, belongs primarily to them.¹ Unless it is so provided by statute, impliedly or expressly, the suit upon this statutory liability cannot be brought by the corporation, nor by its receiver or assignee suing for it.² Since the obligation is a *quasi*-contract, as pointed out in section 62, *ante*, and is double the stock subscription, a close analysis would show that it is simply a doubling of the stock subscription, and therefore the other party to the contract is the corporation. But the other idea is too firmly rooted to be disturbed. In the case of national banks it was originally held that the receiver of the bank was the proper party to bring the suit;³ but this rule has now been changed by statute and it may be brought by creditors⁴ as well as the receiver. But if the receiver refuses to bring the suit the creditors may do so,⁵ even though the state statute gives the right to the receiver or some one else.

§ 66. **Who liable.**—There is a diversity among the statutes as to those who are liable to respond to this liability. If the statute names the particular class of stockholders who are liable, no difficulty is met. Sometimes the statute fixes the liability upon those who are stockholders when the debt was created, and a certain time thereafter.¹ Under statutes that do not fix the class of stockholders liable, it has been variously held that stockholders at the time the debt was contracted,² stockholders at the time payment of

¹ *Richmond v. Irons*, 121 U. S. 21; *Jacobson v. Allen*, 20 Blatchf. 525; *Steinke v. Loofbourrow*, 54 Pac. R. 120; *Runner v. Dwiggins*, 46 N. E. R. 580, 36 L. R. A. 645. Compare *Farmers' Trust Co. v. Funk*, 49 Neb. 353. See § 329, *post*, notes 13, 14, 15, 16, 17.

² See cases last cited; *Worth v. Piedmont Bank*, 28 S. E. R. 488; *Ueland v. Haugan*, 73 N. W. R. 169.

³ *Kennedy v. Gibson*, 8 Wall. 498; *Casey v. Galli*, 94 U. S. 674.

⁴ *Harvey v. Lord*, 11 Biss. 144; *Peters v. Foster*, 56 Hun, 607; *Irons v. Manufacturers' Nat. Bank*, 17 Fed. R. 308; s. c., 27 Fed. R. 591.

⁵ *Anderson v. Seymour*, 73 N. W. R. 171, for a state statute.

¹ *Harper v. Carrol*, 62 Minn. 152.

² *Moss v. Oakley*, 2 Hill, 265.

the debt was refused,³ stockholders at the time of suit brought,⁴ or stockholders at the time insolvency impended,⁵ are meant. It is held even that both the stockholders at the time the debt was contracted and when the action was brought are liable.⁶ Where a stockholder who is such at the time the debt was contracted is made liable, a transfer does not relieve him of this liability, and the contraction of the debt would seem to cover an instalment of a debt falling due.⁷ Where those are made liable who were stockholders at the time the action was brought or insolvency impended, a transfer in good faith, and not colorable nor for the purpose of evading the responsibility, nor made after insolvency, relieves the transferee of liability.⁸ The fact that the stock is not paid for in full of the subscription price has no bearing upon the statutory responsibility.⁹

§ 67. Remedy, whether at law or in equity.—This subject is involved in the greatest confusion. It seems extraordinary that courts can reach such totally different conclusions about a simple matter: In the first place, it is conceded that if the statute gives a special remedy in the particular forum where the suit is brought, that remedy must be followed. Since no one has a vested right in a mere remedy, the remedy may be changed, but not so as to deprive the complainant of all remedy.¹ But the statutes are

³ Bond v. Appleton, 8 Mass. 472.

⁷ See 3 Am. St. R. 860 et seq., in note.

⁴ Cleveland v. Burnham, 55 Wis. 598; Middleton Bank v. Magill, 5 Conn. 28.

⁸ See §§ 46–53, *ante*.

⁵ As under national bank act. See § 70, *post*.

⁹ See Matthews v. Albert, 24 Md. 527; Wheeler v. Millar, 90 N. Y. 353.

⁶ Curtiss v. Harlow, 12 Met. 3; Holyoke Bank v. Burnham, 11 Cush. 183; Brown v. Hitchcock, 36 Ohio St. 667; Sayles v. Bates, 15 R. I. 342; Freeland v. McCullough, 1 Denio, 414; Root v. Sinnock, 120 Ill. 350. The transferor is sometimes made surety for the transferee. Marr v. Bank of West Tennessee, 4 Lea, 578.

¹ Thompson on Liability of Stockholders, § 73; Hawthorne v. Calef, 2 Wall. 10. All matters of remedy are governed by the law of the forum where suit is brought. Special remedies given where the right accrued, but not where remedy is sought, will not be applied in the latter forum. Lowry v. Inman, 46 N. Y. 119; Christensen v. Eno, 106 N. Y. 97.

frequently silent as to the remedy, and the courts are left to fix some rule that will be followed. If, as already pointed out, this liability is one of *quasi*-contract or contract, there ought to be no doubt that an action at law would lie upon it. There might difficulty arise in the matter of proof, but that ought not to affect the legal right. It is perfectly consistent with the foregoing proposition that a suit in equity would also lie for the purpose of avoiding a multiplicity of actions.² It is also perfectly consistent with this proposition that the action at law would not lie until the party had exhausted his remedy against the corporation. The advantage for the action at law is that thereby the first creditor suing, or at any rate first getting a judgment, obtains a priority, of which he cannot be deprived by the person owing the liability,³ and he is not compelled to share the fruits of his diligence with any other creditor, as he would be compelled in equity. In the next place the creditor can single out one stockholder who is most conveniently situated to be sued, and sue him alone without being troubled with the delay or the expense of services upon numerous parties defendant. Again, the stockholder in such an action could not set off any debt⁴ which the corporation owed to him, as he might do if sued in equity.⁵ Nor if the suit is at law could it be treated as a creditor's bill and the judgment at law required to be that of the forum where the equitable remedy is sought.⁶ But when the decisions are consulted they speak "a various

² *Parker v. Carolina Sav. Bank*, 31 S. E. R. 673 (S. C.).

³ *Thebus v. Smiley*, 110 Ill. 316; *Cole v. Butler*, 43 Me. 401; *Jones v. Wiltberger*, 42 Ga. 575; *Bates v. Lewis*, 3 Ohio St. 459. Compare *City of Chicago v. Hall*, 103 Ill. 342; *Savings Ass'n v. Kellogg*, 63 Mo. 540.

⁴ *In re Empire City Bank*, 18 N. Y. 199; *Buchanan v. Meisser*, 105 Ill. 638; *Burnap v. Harkins Engine Co.*, 127 Mass. 586; *Paine v. Stewart*, 33 Conn. 516. But compare *Gauch v.*

Harrison, 12 Bradw. 457, *semble, contra*, and *Boyd v. Hall*, 56 Ga. 563.

⁵ *Welles v. Stout*, 38 Fed. R. 807. But this is not the general rule. See *Hobart v. Gould*, 8 Fed. R. 57; *Sowles v. Witters*, 39 Fed. R. 403. Except where the claim of the stockholder is good as against the creditors in general. But see *Wheeler v. Millar*, 90 N. Y. 353.

⁶ *Patterson v. Lynde*, 112 Ill. 196, which case is clearly wrong upon this point.

language." It was originally held in one court that the creditor had a remedy at law alone,⁷ but this court has receded from this position.⁸ So in the case of national banks it was held that the receiver's suit for an assessment levied by the comptroller was at law.⁹ But courts applying the analogy of a creditor's bill, the analogy consisting of the fact that the assets of the corporation must first be exhausted, have held that where the stockholders were held liable in proportion to the amount of their stock the remedy is in equity and not at law.¹⁰ But in reason the better rule is that where the liability is to the amount of or in proportion to the stock, the creditor may sue either at law or in equity,¹¹ unless, of course, he is also a stockholder, when he would be compelled to sue in equity, as he would be himself liable for part of his own claim.

§ 68. Where legal remedy obtainable.—Where an action at law upon the statutory liability can be brought, it may be under a statute which does not require the exhausting of the bank's assets. In such case the remedy consists in suing the individual stockholder upon his contract. Such was the old method of enforcing the liability for a state bank's circulating notes.¹ But where the right to sue the stockholder is held to be dependent upon the bank's lack of assets, that fact

⁷ *McCarthy v. Lavasche*, 89 Ill. 270.

⁸ *Earnes v. Doris*, 102 Ill. 350; *Tunesma v. Schüttler*, 114 Ill. 156.

⁹ *Casey v. Galli*, 94 U. S. 673. But a suit in equity lies now by the statute. *Irons v. Manufacturers' Nat. Bank*, 27 Fed. R. 591; *Richmond v. Irons*, 121 U. S. 27. The action at law remains and both remedies exist.

¹⁰ *Pollard v. Bailey*, 20 Wall. 520; *Terry v. Tubman*, 92 U. S. 156; *Cuykendall v. Miles*, 10 Fed. R. 342; *Terry v. Martin*, 10 S. C. 263; *Terry v. Little*, 101 U. S. 216; *Allen v.*

Walsh, 25 Minn. 543. Alabama, Arkansas, Michigan, Massachusetts, New Jersey, Ohio, Rhode Island and Wisconsin seem to hold this rule, though not all as to bank statutes.

¹¹ *Carroll v. Green*, 92 U. S. 509; *Mills v. Scott*, 99 U. S. 25, under laws of two different states.

¹ *Adkins v. Thornton*, 19 Ga. 325. See also on this subject, where bonds and notes were given by stockholders to secure circulation, *Duncan v. Biscoe*, 7 Ark. 175; *Van Steenwyck v. Sackett*, 17 Wis. 645; *Rusk v. Sackett*, 28 Wis. 400.

necessarily must appear by allegation and proof. The judgment at law and return of *nulla bona* is sufficient, nor can that judgment be disputed.² If the liability is several, and it would seem to be such in most cases where an action at law lies, but one stockholder can be sued.³ By the action the creditor obtains a priority, which the stockholder sued cannot avoid by payment to any other creditor.⁴ No set-off lies on behalf of the stockholder for a debt owing to him by the corporation,⁵ for the creditor sues in his own right, not by right of the corporation. The question of contribution among the stockholders cannot of course be litigated. The method of recovery, where the liability is in proportion to the stock or some equivalent expression is used, would require allegation and proof as to the exhaustion of the bank's assets, where that is necessary, proof of the whole liability of the stock and of the amount of the stockholder's holding, from which his liability is a mere matter of computation. But if the liability was held to be an equal and ratable one, proof would be required of the total debts, and the proportion of the creditor's debt thereto would be a matter of inference. It is believed, however, that in this latter case an action at law never lies except in the case of national banks, where the amount of the receiver's claim against each stockholder is determined by the assessment of the comptroller of the currency,⁶ or unless the suit is upon an assessment made under an order of a court.

² Marsh v. Burroughs, 1 Woods, 199; Buchanan v. Meisser, 105 Ill. 463. See next section, note 4. 638; Burnap v. Harkins Engine Co.,

³ Perry v. Turner, 55 Mo. 418; 127 Mass. 586; Paine v. Stewart, 33 Terry v. Little, 101 U. S. 216. Conn. 516. The same rule would

⁴ Thebus v. Smiley, 110 Ill. 316; apply in equity as at law. But Cole v. Butler, 43 Me. 401; Jones v. Wheeler v. Millar, 90 N. Y. 353, is Wiltberger, 42 Ga. 575; Bates v. *contra*. And see Boyd v. Hall, 56 Lewis, 3 Ohio St. 459. But see City Ga. 563.

of Chicago v. Hall, 103 Ill. 342; ⁵ See § 70, *infra*; Pickering v. Hastings, 76 N. W. R. 587; Gager v. Savings Asso. v. Kellogg, 63 Mo. Bank of Edgerton, 77 N. W. R. 920. 540.

⁶ In re Empire City Bank, 18 N. Y. But see Boyd v. Hall, 56 Ga. 563.

§ 69. **Suit in equity.**—Where the rule is held that the suit to enforce the stockholder's liability must be brought in equity, or wherever such a suit is brought on grounds of convenience, although an action at law lies, the suit should be brought on behalf of all the creditors similarly situated,¹ and against all the stockholders liable,² unless certain of them cannot be made parties because beyond the court's jurisdiction.³ Where it is necessary to show, as a condition precedent to maintaining the suit, that the bank has no available assets, the recovery of a judgment and a return of *nulla bona* must appear; but facts that excuse such a proceeding may be alleged and proven, as that the bank is insolvent or in the hands of a receiver, or any other facts that render such a proceeding useless.⁴ The suit must necessarily be brought by the creditors unless the statute permits some one else to sue.⁵ There can be no set-off pleaded in favor of a stockholder on account of claims against the bank,⁶ but there are exceptions. One is the exception under a peculiar

¹ *Irons v. Manuf. Nat. Bank*, 27 Fed. R. 591.

² *Terry v. Martin*, 10 Rich. 263; *Coleman v. White*, 14 Wis. 700.

³ *Terry v. Martin*, *supra*; *Kennedy v. Gibson*, 8 Wall. 498.

⁴ *Hodgson v. Cheever*, 8 Mo. App. 318. There is such a confusion between courts as to whether this is necessary without a statute that no general rule can be found. See 3 Am. St. R. 851, in note, and § 63, *ante*.

⁵ See cases cited in note 1, § 65, *supra*. And see *Howarth v. Ellwanger*, 86 Fed. R. 54; *Watterson v. Masterson*, 15 Wash. 511; *State v. Union Stock Yards Bank*, 70 N. W. R. 752. But even if the suit is given to the receiver or a particular officer it may be brought by a creditor (*Worth v. Piedmont Bank*, 28 S. E. R. 488), if the officer or re-

ceiver will not sue (*Anderson v. Seymour*, 73 N. W. R. 171), without applying to the corporation. *Foster v. Bank of Abingdon*, 88 Fed. R. 604. This case decides that creditors suing for negligent injuries to bank by the officers are not within the ninety-fourth equity rule, which required an application to the corporation and a refusal by it to sue. But of course the bank or its receiver must be a party to the action.

⁶ *Hobart v. Gould*, 8 Fed. R. 57; *Sowles v. Witters*, 39 Fed. R. 403; *Witters v. Sowles*, 32 Fed. R. 130; *Thompson v. Meisser*, 108 Ill. 359; *In re Empire City Bank*, 18 N. Y. 119; *Buchanan v. Meisser*, 105 Ill. 638; *Burnap v. Harkins Engine Co.*, 127 Mass. 586; *Paine v. Stewart*, 33 Conn. 516; *Parker v. Carolina Sav. Bank*, 31 S. E. R. 673.

statute in New York, where the statutory liability arises upon a failure to pay in the whole capital,⁷ and another exception is that if the stockholder's claim is of such a nature that he is entitled to payment before the creditors, his claim may be set off.⁸ The nature of the action provides for a contribution among the stockholders, since all must be sued. The decree in equity must be several as against the different stockholders, unless, of course, the liability is made joint, when a decree against all for the whole amount would be good. Such a case is impossible where the liability is in proportion to the amount of stock held by each stockholder.⁹ In an equitable proceeding it is a matter of some doubt whether the corporation ought to be made a party or not, either through itself or its receiver or assignee. Where the right to sue belongs to the creditors and is against the stockholders, it would seem to be reasonably plain that the corporation is not concerned.¹⁰ But owing to statutes which give the receiver the right to sue, and other statutes or rulings which require the assets of the corporation to be exhausted, it is rarely safe to omit making the corporation or its representative a party to a suit in equity. The judgment against the corporation being conclusive,¹¹ such a course can work no injury; and where no execution has been issued on the judgment, or where no judgment has been obtained, the presence of the corporation as a party is as necessary to complete justice as the presence of its representative is necessary where the right of action is given to him.

⁷ *Wheeler v. Millar*, 90 N. Y. 353. The reasoning of this case is exceedingly attenuated. Compare *Boyd v. Hall*, 56 Ga. 563.

⁸ *Wells v. Stout*, 38 Fed. R. 807. This case seems right wherever the assets of the corporation must first be exhausted.

⁹ See cases cited in note 9 to § 65, *supra*. But at law several stockholders might be sued where the liability of none exceeded the debt.

¹⁰ See § 65, *supra*. But it seems to be permissible to join in this action causes of action against officers of the bank. Where this is done, it is needless to say the corporation and its receiver should both be made parties, because the right of action is in the bank. See *Gager v. Marsden*, 77 N. W. R. 920.

¹¹ *Marsh v. Burroughs*, 1 Woods, 463. See 3 Am. St. R. 858, in note.

§ 70. **National banks.**— We have already noticed to some extent the remedy applied in the case of national banks. The procedure as to those banks is somewhat simplified by the fact that when the bank is in difficulties it is taken possession of by an examiner or by a receiver appointed by the comptroller of the currency, who determines the assessment to be levied upon each stockholder.¹ But congress, not satisfied with a plain and intelligent system, out of a desire, perhaps, to provide against the comptroller's failure of duty, has given to creditors the right to institute an action which attains the same result as the comptroller's action.² As a necessary condition to this suit it must appear that the bank is insolvent. The bank, of course, must be made a party; the court establishes the liability of stockholders and provides for the same by its judgment. This judgment must be several as against the various stockholders, since the liability is several.³ The proceeding is for the benefit of all creditors,⁴ and should be against all stockholders subject to the jurisdiction.⁵ The same rules as to set-off would apply in such a suit as are mentioned in the last section. The method to be followed in ascertaining the amounts to be awarded by the decree would require, first, the ascertainment of the whole par value of the stock; next, the fixing of the amount of the deficit necessary to pay debts over and above the assets; next, the ascertaining whether the total liability amounted to or exceeded the total deficit. If the

¹ Kennedy v. Gibson, 8 Wall. 498.

² Statute of June 30, 1876. See Harvey v. Lord, 11 Biss. 144; Peters v. Foster, 56 Hun, 607; Irons v. Manuf. Nat. Bank, 17 Fed. R. 308. There seems to be no necessity for this statute, and in its working it must be plain that an assessment laboriously made by a court cannot be as expeditious as an assessment made by the comptroller. It ought not to be assumed in any case that the comptroller would

not properly perform his duties. But the conduct of the receiver in Ex parte Chetwood, 165 U. S. 443, is a full justification of the statute.

³ Kennedy v. Gibson, 8 Wall. 498; United States v. Knox, 102 U. S. 422.

⁴ Irons v. Manuf. Nat. Bank, 27 Fed. R. 591.

⁵ Kennedy v. Gibson, 8 Wall. 498. This seems fairly deducible in principle from that decision. It would be the general rule.

liability should not equal the deficit, the various claims must be scaled down to the total liability. Then each stockholder should be adjudged to pay his proportionate amount of the deficit, where it does not reach the total liability, or of the deficit as scaled down where it exceeds the total liability. The distribution among the creditors would be a mere matter of computation. But the stockholders would be liable for the bank's own stock which it held; provided, of course, the total liability, as divided among the stockholders, did not exceed, for any single stockholder, his statutory liability of an amount equal to his stock. The insolvency of any stockholder could not increase in any way another stockholder's liability, since stockholders are not held one for the other.⁶ But a suit like the foregoing might also be brought by the receiver appointed by a court at the instance of a creditor. The result would not be different from that attained by a suit instituted by creditors, where the whole relief was obtained in one action, even to the appointing of a receiver. In practice a suit by creditors would never be instituted without asking for the appointment of a receiver, since it is not conceivable that a bank could go on doing business while such a suit was in progress. A national bank might make an assignment to an assignee or trustee, but such a course would be impracticable, since the comptroller might at once take possession.⁷ The better method would be to follow that of the railroads and have a receiver appointed at the suit of some creditor, with the concurrence of the corporation.⁸ Such a course would prevent the comptroller taking possession by his receiver,⁹ and

⁶ United States v. Knox, 103 U. S. 422.

⁷ Such an act would be one of insolvency, and conclusive evidence thereof.

⁸ This method, which is so popular among railway managers, ought not to be permitted to them as a monopoly, although it might be urged that there was a necessity

for keeping the railroad in operation. See 30 Am. Law Rev. 801, an article by Moorfield Storey. Since a state court cannot issue an injunction against a national bank, it is difficult to see how it can act as well as the United States court, which can enjoin the bank. See § 352, *post*.

⁹ Harvey v. Lord, 11 Biss. 144,

would answer the same purpose as an assignment. It should not be overlooked that United States courts, under the statute of 1887, corrected in 1888, have jurisdiction of these winding-up suits, regardless of the citizenship of the bank or of the parties. When the comptroller takes possession by his receiver, whenever such a step is permitted by law, the comptroller, as soon as the deficit of assets is ascertained by him, proceeds to make an assessment upon the stockholders.¹⁰ This judgment of the comptroller is conclusive as to the necessity for, and the amount of, the assessment.¹¹ It was originally held that the receiver was the only party to sue for this assessment, and that his action therefor was at law.¹² But this ruling has now been changed by statute, and he may sue all the stockholders in equity.¹³ He ought to have been able to do so, in order to avoid a multiplicity of actions, under a general rule of equitable jurisprudence. The creditors are neither necessary nor proper parties to an action by the receiver.¹⁴ He can unite in the same action a suit for unpaid subscription and a suit for the statutory liability.¹⁵ But independent proof, it has been said, must be made of the insolvency of the corporation. The order of the comptroller, it has been wrongly held, is not binding upon the stockholders, as proof of the bank's insolvency.¹⁶

where it is held that the comptroller ought not to proceed where a court has acted and, it follows, is about to act.

¹⁰ This is a condition precedent to such a receiver's suit. *Kennedy v. Gibson*, 8 Wall. 498.

¹¹ *Kennedy v. Gibson*, *supra*; *Casey v. Galli*, 94 U. S. 673; *Strong v. Southworth*, Fed. Cas. No. 13,545; *O'Connor v. Witherby*, 111 Cal. 523. Compare *Bowden v. Johnson*, 107 U. S. 251; *Neale v. Wall*, 70 Fed. R. 806.

¹² *Kennedy v. Gibson*, 8 Wall. 498; *Casey v. Galli*, 94 U. S. 674.

¹³ *Irons v. Manuf. Nat. Bank*, 27

Fed. R. 591; *Richmond v. Irons*, 121 U. S. 27.

¹⁴ *Kennedy v. Gibson*, 8 Wall. 498.

¹⁵ *Warner v. Callender*, 20 Ohio St. 190. The principle applies whenever the receiver or any one else can enforce both liabilities.

¹⁶ *Bowden v. Morris*, 1 Hughes, 378. See *Bowden v. Johnson*, 107 U. S. 251; *Neale v. Wall*, 70 Fed. R. 806. Yet the order of the comptroller is conclusive as to the receiver's authority. Since this order of the receiver is a substitute for a judgment of a court, it is wrong to hold that it is not conclusive upon all as to the fact of insolvency. See

The payment of a voluntary assessment by the stockholder will not reduce his liability,¹⁷ nor can he offset the bank's debts to him,¹⁸ except when his claim is payable out of the assets of the bank before any of the creditors are payable.¹⁹ When the receiver sues in equity he ought to unite as defendants all the stockholders who can be served.²⁰ But the state laws do not govern the receiver suing in the federal courts.²¹ A trustee of stock as a party represents his beneficiary.²² The receiver cannot compound this statutory liability of stockholders,²³ although the court may permit him to compromise the claim; but the circumstances must be conclusive as to the propriety of such action.²⁴

§ 71. **Other questions as to liability.**—There are instances where the existence of the right to enforce the liability is made dependent upon a fact other than insolvency, such, as in the case of national banks, failure to redeem circulating notes,¹ and in state banks dissolution.² Insolvency may be proven in any of the ways permitted by law. Certain facts are conclusive proof of insolvency, such as a failure to redeem notes in specie,³ or failure to discharge claims upon it in the due course of business, or the fact may appear by proof that the bank is notoriously insolvent.⁴ It is needless to point out that in a suit to enforce this liability such condition to the liability must be alleged and proven. The liability is single in the sense that the stockholder can be compelled to discharge it but once. If he pays in part, the payment is a discharge *pro tanto*. The claim is barred

§ 42, *supra*. Washington Nat. Bank v. Eckels, 57 Fed. R. 870, is *contra*. ²³ Price v. Yates, Fed. Cas. No. 11,418.

¹⁷ Delano v. Butler, 118 U. S. 634.

¹⁸ Sowles v. Witters, 39 Fed. R. 403.

¹⁹ Welles v. Stout, 38 Fed. C. 807.

²⁰ This follows from the nature of the action.

²¹ Stanton v. Wilkeson, Fed. Cas. No. 13,299.

²² Wadsworth v. Hocking, 61 Ill. App. 156.

²⁴ In re Stockholders' Cal. Nat. Bank, 53 Fed. R. 38.

¹ See § 42, *ante*.

² See Donnelly v. Hodgson, 14 Mo. App. 548.

³ Lane v. Morris, 8 Ga. 468; Terry v. Culnan, 13 S. C. 220.

⁴ Terry v. Tubman, 92 U. S. 156; Terry v. Anderson, 95 U. S. 628.

by the statute of limitations in equity as at law.⁵ The statute begins to run from the accrual of the liability,⁶ and whenever the creditor's debt against the bank is barred, his claim upon the stockholders is also barred.⁷ Interest on the liability in national bank cases runs from the order of assessment,⁸ and in cases under state laws runs either from the commencement of the action⁹ or from the date of the decree.¹⁰

§ 72. **Dividends.**—It is not our purpose to examine the whole subject of dividends upon stock, but merely the decisions in bank cases thereon. The power to declare dividends belongs to the board of directors. Their discretion in regard thereto will not be interfered with unless clearly abused.¹ For an abuse of the power, a civil as well as in some cases a criminal responsibility rests upon them.² But there can be no doubt that bank directors have the right to collect a surplus before declaring dividends.³ In some cases they are directed to do so by statute. But a dividend that has been obtained by a decrease of stock cannot be retained by the bank as surplus.⁴ The bank, whatever may be its power to hold a lien upon its stock, may hold a stockholder's dividend upon an indebtedness of the stockholder to the bank.⁵

⁵ *Carrol v. Green*, 92 U. S. 509.

⁹ *Barnes v. Arnold*, 51 N. Y. Supp.

⁶ *Godfrey v. Terry*, 97 U. S. 171; 1109.

Thompson v. German Ins. Co., 77 Fed. R. 258; *Baker v. Atlas Bank*, 9 Met. 182; *Long v. Bank of Yanceyville*, 90 N. C. 405; *Amer v. Armstrong*, 6 Pa. Co. Ct. R. 392. The rule is the same as to unpaid subscriptions for capital stock.

¹⁰ *Palmer v. Bank of Zumbrota*, 75 N. W. R. 380.

¹ *Ely v. Sprague*, Clarke Ch. 359; *Hiscock v. Lacey*, 30 N. Y. Supp. 860.

² See § 93, note 14, *infra*, and see last case in preceding note.

⁷ *Fleischer v. Rentchler*, 17 Ill. App. 402.

³ *Reynolds v. Bank of Mt. Vernon*, 39 N. Y. Supp. 623.

⁸ If made under an order of a court, from the date of the order; or if made by the comptroller, from the date of his order. *Casey v. Galli*, 94 U. S. 673; *Bowden v. Johnson*, 107 U. S. 251.

⁴ *Seley v. Exch. Nat. Bank*, 78 N. Y. 608.

⁵ *Hagar v. Union Nat. Bank*, 63 Me. 509; *First Nat. Bank v. De Morse*, 26 S. W. R. 417. Compare *Brent v. Bank of Washington*, 2 Cranch C. C. 517.

CHAPTER V.

OFFICERS AND AGENTS.

ARTICLE I.—DUTIES AND LIABILITIES.

§ 73. **In general.**—A corporation can act only by means of agents. All its officers and employees are agents to do certain acts. A private banker or a partnership or joint-stock company has in practice the same kinds of officers and agents that a corporation has, with the exception of a board of directors and officers of the board. Some private banks have the same machinery for making loans or discounts that a corporation has. Where a private bank has officers such as an incorporated bank, the powers and duties of those officers, and the rules of law governing them, must be precisely the same.¹

§ 74. **Appointment of agents.**—A corporation and a private person may appoint an agent to do anything that the principal can do.¹ In the case of a corporation the powers of the corporation are in the first instance lodged in a board of directors, who exercise the corporate powers. Certain portions of these powers are in practice delegated to agents, whose appointment need not be under seal,² and the fact of agency, just as in the case of a private person as principal, may arise from the fact of acting as such agent with knowledge on the part of the principal or of those who represent it.³

§ 75. **Corporate officers.**—The officers of a corporation must be elected in the manner provided by its charter or in

¹ Austin v. Daniels, 4 Denio, 299; & G. 324; Townson v. Havre de Grace Bank, 6 Har. & J. 47.
Bidwell v. Madison, 10 Minn. 13.

² Bates v. State Bank, 2 Ala. 451.

³ Bradstreet v. Bank of Royalton,

2 Savings Bank v. Davis, 8 Conn. 42 Vt. 123.

191; Union Bank v. Ridgley, 1 H.

a manner consonant thereto.¹ In practice the officers other than directors are generally elected or appointed by the board of directors, but the method pointed out by the charter must be followed.² Yet as to third parties, *de facto* officers, that is to say officers who are publicly acting as such, but without proper appointment, election or qualification, will be held, certainly as to third persons, to be proper officers.³ Should vacancies occur, they must be filled as provided in the charter.⁴ The general officers of a bank usually hold until removed as provided by the charter or law, or until a successor is appointed and qualified.⁵ But a suspension of an officer does not take effect until the fact is brought to his knowledge.⁶

§ 76. Bonds of officers.—Where a bond is taken from an officer for the due performance of his duties, and every corporation has such a right (*Bank v. Cresson*, 12 Serg. & R. 306), the general principles of law governing such instruments are applicable. The bond, of course, covers only the office as to which it is given.¹ It need not conform to the terms of the law, but will take effect as a common-law bond.²

¹ *State v. Thompson*, 27 Mo. 365. A stockholder in debt to the corporation on his original subscription cannot vote for directors. *United States v. Barry*, 36 Fed. R. 246.

² *Booker v. Young*, 12 Grat. 303. But as against the direct attack upon a director's title he must show a valid election and qualification. It is therefore held that one who obtains shares by transfer after expiration of a national banking charter is ineligible. *Richards v. Attleborough Nat. Bank*, 148 Mass. 187. This decision is wrong because it was in fact a case of collateral attack.

³ *Baird v. Bank of Washington*, 11 S. & R. 411; *Cooker v. Curtis*, 30 Me. 488; *Milliken v. Steiner*, 56 Ga.

251; but see *Bartholomew v. Bentley*, 1 Ohio St. 37.

⁴ *Bank of Virginia v. Robinson*, 5 Grat. 174. A general law is, of course, if applicable, part of the charter.

⁵ So held as to a cashier, but the rule is general. *Union Bank v. Ridgely*, 1 Har. & G. 324; *Dedham Bank v. Chickering*, 3 Pick. 335; *Sparks v. Farmers' Bank*, 3 Del. Ch. 274. A by-law cannot make the cashier of a national bank an annual officer. *Westervelt v. Mohrenstecker*, 76 Fed. R. 118.

⁶ *Bank of U. S. v. Magill*, 12 Wheat. 511.

¹ *Northw. Nat. Bank v. Keen*, 14 Phila. 7.

² *Grocers' Bank v. Kingman*, 16

The principal in the bond need not sign it,³ nor does a misnomer destroy its efficacy.⁴ The bond will be binding whether executed before or after the officer enters upon the performance of the duties of his office.⁵ An acceptance of the bond by the corporation will be presumed, whether the acceptance be in the form required by law or not.⁶ The bond holds good until it is released by the terms of the law or by proper authority.⁷ Whether a bond is required from the officer or not cannot affect in any way the lawfulness of his acts while he is permitted to act.

§ 77. **Salaries.**—If an officer is not a director his salary is generally fixed by the board of directors, unless the law forbids it.¹ If such an officer or an agent is permitted to draw a salary larger than the amount originally fixed, which fact is reported to the board of directors and no objection is made by it, there will be inferred an agreement implied as a fact to pay the additional amount.² But since the directors themselves wield the corporate powers, their salary, if one can be lawfully drawn by them, must be agreed upon prior to their election.³ The board of directors cannot vote salaries to themselves after election, nor can they vote a salary to one of their number as an officer, where the particular director's vote is necessary to the order,⁴ or where he is present and takes part in the meeting.⁵ But this principle

Gray, 473; State Bank v. Lock, 4 Dev. 529.

³ Bank of North Liberties v. Cresson, 12 S. & R. 306.

⁴ Pendleton v. Bank of Kentucky, 1 T. B. Mon. 171.

⁵ Bank of U. S. v. Brent, 2 Cranch, C. C. 696.

⁶ Bank of U. S. v. Dandridge, 12 Wheat. 64; Pryse v. Farmers' Bank, 33 S. W. R. 532. And see two first cases cited in note 5 to last section.

⁷ State Treas. v. Mann, 34 Vt. 371; Pendleton v. Bank of Ky., 1 T. B. Mon. 171.

¹ Mobile Branch Bank v. Collins, 7 Ala. 95.

² San Joaquin Valley Bank v. Bowers, 65 Cal. 247. See Blue v. Cap. Nat. Bank, 145 Ind. 518.

³ Wickersham v. Crittenden, 93 Cal. 17.

⁴ Wickersham v. Crittenden, *supra*.

⁵ Wickersham v. Crittenden, *supra*, uses this language, but the case is wrong if it means to say that any action taken by the board of directors as to a contract with one of the board is vitiated by the fact

does not prevent a director from receiving pay for services which he has rendered to the bank as an agent outside of the duties of his office of director.⁶ Neither a director nor an officer who is one of the board can require pay for services which he has rendered as director or president, nor can such officer recover on a *quantum meruit*;⁷ but if the services rendered are extraordinary or outside of the duties of the office, he can recover, according to some decisions.⁸ The fair rule is that where services are rendered which a director or an officer who is one of the board could not be called upon to perform, and there is nothing to show that the services were gratuitous, he ought to be permitted to recover. Yet owing to the fact that abuses might arise, the weight of authority is that services rendered are gratuitous, unless expressly made otherwise. As to any other officer, the general rule applies that whatever he does for the corporation is covered by his salary.

§ 78. Board of directors.—The directors act as a board at meetings either specially called or fixed by the by-laws or general law or charter. Unless it be otherwise provided a notice need not be given of fixed and stated meetings.¹ The rule has been carried so far as to apply to a special meeting.² But unless the articles of agreement or by-laws, or a statute, provides otherwise, the notice need not state the object of the meeting unless business out of the usual nature is transacted.³ It is not necessary for the board to keep a written

that such director takes part, although a majority of the board without the interested director vote for the proposition.

⁶Chandler v. Monmouth Bank, 13 N. J. Law, 255.

⁷Holland v. Lewiston Falls Bank, 52 Me. 564; Sawyer v. Pawners Bank, 88 Mass. 207; Penn v. First Nat. Bank, 130 Mass. 391; Blue v. Cap. Nat. Bank, 145 Ind. 518.

⁸See cases cited in preceding note; but compare Leavitt v. Beers,

Hill & D. Supp. 221, which holds otherwise.

¹See the case cited in the next note.

²If it is the custom to hold directors' meetings, where a sufficient number is present no notice is required, unless the statute or a by-law requires it. Am. Ex. Nat. Bank v. First Nat. Bank, 82 Fed. R. 961.

³Savings Bank v. Davis, 8 Conn. 191.

record of their doings unless they are required to do so by the charter or the by-laws, for the acts of the board may be proven by parol.⁴ A quorum of the directors may act as a board;⁵ but if it be customary to allow less than a quorum to act, the doings of such less number will bind the corporation in regard to acts authorized by the customary mode of proceeding.⁶ The president, if he be one of the board, or if he is entitled to the powers of a director, is one of the quorum.⁷ The general rule is that the director cannot act in regard to a matter in which he is personally interested as against the bank; yet this rule would not apply to innocent third parties who had no notice of the director's interest.⁸ A director may resign and relieve himself from liability, although he be elected to hold for one year and until his successor be elected or appointed and qualified.⁹

§ 79. Liability of officers and agents to bank.—Leaving out of view for the present directors, we may say that the rule governing the responsibility of the officer or agent to the bank is simply an application of the law of principal and agent. If the officer in any way misappropriates the funds of the bank he is liable to the bank therefor.¹ In whatever form the misapplication of the funds is made, the bank may hold the officer liable,² and may follow the funds or the property obtained thereby until they reach a *bona fide* holder.³ The officer being an agent, if the agent has diverted the

⁴ *Edgerly v. Emerson*, 23 N. H. 555. But if the law requires the record to be in writing, can the writing be supplemented or varied by parol, or can it be supplied by parol? As between persons who are bound by the record the answer would be no, but as to third persons not bound thereby the answer would be yes.

⁵ *Nat. Bank of Commerce v. Shumway*, 49 Kan. 224.

⁶ *Nat. Security Bank v. Cushman*, 121 Mass. 490.

⁷ *Bank of Maryland v. Ruff*, 7 Gill & J. 448.

⁸ *Baird v. Bank of Washington*, 11 S. & R. 411.

⁹ *Briggs v. Spalding*, 141 U. S. 132; *Movius v. Lee*, 30 Fed. R. 298.

¹ *First Nat. Bank v. Drake*, 29 Kan. 311; *Austin v. Daniels*, 4 Denio, 299; *Knapp v. Roche*, 62 N. Y. 614; *In re Boker*, 7 Phila. 479.

² See cases cited in preceding note.

³ *Farmers' Bank v. Kimball Milling Co.*, 1 S. D. 388; *Anderson v.*

moneys of his principal, they may be pursued at law in an action for money had and received until the funds come into the hands of a *bona fide* holder,⁴ or the remedy may be pursued in equity as for a breach of trust.⁵ Thus, where the president of a bank issues to a firm of brokers with whom he is doing business the drafts of the bank, which show upon their face that they were issued by himself, and are received by those who know that they are being received upon the president's private business, the funds may be reclaimed by the bank or by its receiver.⁶ The president himself would also be liable, just as he is held liable to the bank, for causing an unenforceable loan to be made to a minor.⁷ So where a bank president sold his stock in a bank when it was embarrassed, and took the purchaser's check upon the bank for the price, and caused the bank to cash the check by permitting the purchaser an overdraft, he was held liable to the bank for the amount of the check.⁸ All cases of misappropriation of the bank's funds are properly cases of fraud, although the officer himself may gain no benefit. This rule applies to every officer and agent of the bank whatever his grade may be. The persons liable may also include those not agents who knowingly assisted the fraud. The various classes of persons liable may be classed as follows: Those who were concerned in the unlawful, improvident or culpably negligent transaction and profited by it; those who were concerned in it but did not profit by it; these two classes may include both agents and those who are not agents; then those who negligently failed to perform their duty in preventing the transaction, although they knew of

Kissam, 35 Fed. R. 699; Lamson v. 188; Thompson v. Hynds, 15 Utah, 389. See also Atlantic Bank v. Merchants' Bank, 10 Gray, 532; Skinner v. Merchants' Bank, 4 Allen, 290. The following cases, Pascoag Bank v. Hunt, 3 Edw. Ch. 583, and Bank of Charleston v. State Bank, 13 Rich. Law, 291, are wrong.

⁴ See cases cited in note 3.

⁵ See cases cited in note 3.

⁶ Lamson v. Beard, 94 Fed. R. 30.

⁷ Brown v. Farmers' Bank, 88 Tex. 265. Or worthless overdrafts. First Nat. Bank v. Reed, 36 Mich. 263.

⁸ Germania Sav. Bank v. Wulfe-kuhler, 19 Kan. 60.

⁴ Keener on Quasi-Contract, 183-

it; those who, though not cognizant of the transaction, yet negligently failed to perform a duty, the performance of which would have prevented the transaction; those who failed to exercise a reasonable inspection, though charged with that duty, and thus contributed to the loss. These distinctions are taken from *Williams v. McKay*, 46 N. J. Eq. 25, a valuable opinion. Sometimes the statute gives a right of action,⁹ but the statute is needless. Where negligence is charged which is a case of failure to act, the test to be applied to any officer other than an unpaid director is the care which a man of ordinary prudence would apply to his own affairs.¹⁰ Thus, if the cashier fails to properly notify the maker of a note, whereby the bank suffers loss through the escape of an indorser, the cashier is responsible to his bank to the extent of the loss suffered.¹¹ If the president of the bank allows a customer to take a security away from the bank, and the bank suffers loss, the officer must respond, although there was a banking custom permitting the act.¹² And where an officer negligently permits an overdraft he is responsible to the bank for the loss,¹³ but not where he takes sufficient security.¹⁴ But if the bank be not injured by the act no liability results, and the same is the case where the bank ratifies the act.¹⁵ An officer is liable for the acts of

⁹ *Buell v. Warner*, 33 Vt. 570. Because there was a remedy by statute, a court mistaking the law in the case below, held that there was no other liability. It was in a creditor's suit, but it was wholly wrong. *Dedrick v. Bank of Commerce*, 45 S. W. R. 786 (Tenn.).

¹⁰ *Pryse v. Farmers' Bank*, 33 S. W. R. 532. See also *Second Nat. Bank v. Burt*, 93 N. Y. 233, which was a case of worthless indorsement.

¹¹ *Bidwell v. Madison*, 10 Minn. 13. In no such case is the bank required to proceed against the worthless borrower or the party

liable on the contract before proceeding against the officer liable. *Paine v. Barnum*, 50 How. Pr. 303.

¹² *Citizens' Bank v. Wiegand*, 5 Wkly. Notes Cas. 12. Or if he makes a worthless purchase, he is liable for the loss, including the expenses of a suit caused by it. *Stearns v. Lawrence*, 83 Fed. R. 738.

¹³ *Bank of St. Mary's v. Calder*, 3 Strob. 403.

¹⁴ *Commercial Bank v. Ten Eyck*, 48 N. Y. 305.

¹⁵ Where no injury. *Commercial Bank v. Ten Eyck*, 50 Barb. 9; *Wallace v. Savings Bank*, 89 Tenn. 630. *Ratification. First Nat. Bank v.*

his subordinates only where he has been guilty of negligence in employing or retaining them.¹⁶ Finally, if an officer disobeys positive instructions, or does acts contrary to the authority given him, he is liable, regardless of his own care, where the acts result in loss to the bank.¹⁷ The case of the liability for negligence of bank directors who act gratuitously needs separate consideration from that of other officers. They are, of course, liable for fraud. Three different tests have been offered as to their responsibility to the bank for negligence. The first is that they are liable for gross negligence.¹⁸ The second is that they are held to the same care that a man of ordinary prudence would exercise in regard to his own affairs.¹⁹ The third is they are held to the care that a man of ordinary prudence would exercise under the same circumstances.²⁰ The third test is preferable: the first is unmeaning, the second is too harsh. The remedy for the bank is at law where the directors sued are all liable.²¹

Reed, 36 Mich. 263; Jones v. Johnson, 86 Ky. 530. See also Clews v. Bardon, 36 Fed. R. 617.

¹⁶ Briggs v. Spalding, 141 U. S. 132; Batchelor v. Planters' Nat. Bank, 78 Ky. 435. Compare Pepper v. Planters' Nat. Bank, 5 Ky. Law R. 85. So directors for cashier. Robinson v. Hall, 63 Fed. R. 222; s. c., 25 U. S. App. 48.

¹⁷ San Joaquin Valley Bank v. Bowers, 65 Cal. 247.

¹⁸ Dunn v. Kyle, 14 Bush, 134; Swentzel v. Penn Bank, 147 Pa. 140; Bank v. Boisseux, 4 Hughes, 387.

¹⁹ Hun v. Cary, 82 N. Y. 65; Briggs v. Spalding, 141 U. S. 132.

²⁰ Delano v. Case, 121 Ill. 247; Jones v. Johnson, 86 Ky. 530. The first test does not differ from the third except in the mere splitting of hairs. When does a man show gross negligence? The standard of the law as to negligence is the care of an average prudent man. Is

gross negligence the failure to observe the care of a man less than reasonably prudent? Is it anything from such a failure to the want of care shown by a man with no prudence at all, i. e., the maniac? The very inquiry ends in absurdity. The futility of this attempted distinction has been pointed out by very great judges; by Justice Curtis, in *Steamboat v. King*, 16 How. 474; by Justice Bradley, in *New York R. Co. v. Lockwood*, 17 Wall. 382; by Justice Willes, in *Lord v. Midland Co.*, L. R. 2 C. P. 339; by Baron Rolfe, in *Wilson v. Brett*, 11 M. & W. 113; and by Lord Denman, in *Hinton v. Dibbin*, 2 Q. B. 646.

²¹ Stephens v. Overstolz, 43 Fed. R. 771. *Contra*, Wells v. Graves, 41 Fed. R. 459, which is wrong. A suit in equity lies on the theory of a breach of trust (*Merchants' Bank v. Jeffries*, 21 W. Va. 504), or of account.

But of course a suit at law would not lie against certain officers for one act and certain other officers for another act. These suits would necessarily be separate suits²² where the suit was at law but not in equity. The cause of action against officers is held to survive against the personal representative in *Wilkinson v. Dodd*, 41 N. J. Eq. 566.

§ 80. **Liability to stockholders.**—It is everywhere conceded that if an officer or director commits a tort he is responsible to the person injured whether that person is a stockholder or not. But the right of action does not arise because the tort-feasor is an officer of the bank nor because the injured party is a stockholder. The officer is liable just as another person not an officer would be liable. Thus, if a bank officer makes false and fraudulent representations to a stockholder upon which the latter acts to his injury; if he, assuming a duty to act, acts negligently about the stockholder's private affairs, not the bank's affairs; or if he commits any other tort against the stockholder, he will be liable in the appropriate kind of an action, even if the corporation be also liable to the stockholder injured.¹ The director and the stockholder are considered simply as private individuals not interested in the same corporation. But merely as an officer of the bank, the officer owes no duty to the stockholder as such that he does not owe as an individual to the stockholder as an individual. Therefore as a general rule the stockholder cannot sue the bank officer for a breach of the duty which the officer owes to the bank, either at law or in equity.² This arises from the fact that the incorporated bank is one person and the stockholder is another person who does not own the rights of the corporation. But

²² *O'Brien v. Fitzgerald*, 143 N. Y. 377. A receiver's suit; but the same principle would apply to the corporation's suit. This latter case is inconclusive as to the nature of the action, whether at law or in equity.

¹ See dissenting opinion in *Wil-*

son v. First Nat. Bank, 1 Wyo. 103, for a legal curiosity.

² *Conway v. Halsey*, 44 N. J. Law, 462; *Craig v. Gregg*, 83 Pa. 19; *Rich v. Shaw*, 23 Me. 343; *Smith v. Hurd*, 12 Met. 371. These last three cases are in states which originally had no system of equitable remedies.

the law recognizes that a stockholder has certain rights in the corporation. One of those is to bring a suit in equity to enforce a right of the bank, when the controlling officers of the bank refuse to enforce the right, either because they are the wrong-doers or for some other reason.³ But it is plain that in the latter case he sues in right of the bank, and in such a suit the bank is a necessary party. The fruits of the litigation do not belong to the stockholder, but to the bank.⁴ If this distinction had been kept clearly in view no confusion would have resulted, but the stockholder in this latter suit has been allowed to mingle rights which belonged to him as an individual with rights which he was asserting in the name of the bank.⁵ But it is possible that in such a litigation a court could by its decree separate those rights and give one kind of a judgment to the stockholder as an

But the principle is plainly correct. But if the statute gives the stockholder a remedy that is another matter. *Buell v. Warner*, 33 Vt. 570.

³*Smith v. Rathbun*, 22 Hun, 150; *Brinckerhoof v. Bostwick*, 99 N. Y. 185; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630; *Ackerman v. Halsey*, 37 N. J. Eq. 356; *Nelson v. Burrows*, 9 Abb. N. C. 280.

⁴*Dewing v. Perdicaries*, 96 U. S. 193, as to a creditor's suit, to which the same rule must apply, if the suit is allowed. *Chester v. Halliard*, 34 N. J. Eq. 341.

⁵*Hand v. Atlantic Nat. Bank*, 55 How. Pr. 231. A case that presents a remarkable confusion of ideas is found in Utah. *Warren v. Robison*, 57 Pac. R. 287. The case was a suit by creditors and stockholders against the directors, charging negligence in making loans and managing the affairs of the bank, whereby its funds were dissipated.

The suit was not, of course, one by depositors alleging the reception of deposits while the bank was insolvent. Therefore it was a suit by the creditors and stockholders in right of the bank. To such a suit the bank was a necessary party. The receiver was a party, but he had been discharged. And although the point is made in the briefs, the court does not even notice it. The opinion makes a remarkable suggestion, and that is that the stockholders and creditors may have been guilty of such contributory negligence as to defeat their recovery. The learned court evidently supposed that the stockholders and creditors were suing for being run down by a railroad train. Contributory negligence in such a case as this is impossible. The plaintiffs had no control of the corporation. The opinion is by Bartch, J., who has won a deserved immortality.

individual and another kind of a judgment to him for the corporation.

§ 81. Suits by bank assignees and receivers against officers.—The rights of action which the bank has pass to its assignee¹ or receiver.² He, of course, can enforce whatever right the bank could enforce, against both officers and third persons. Even though the statute declares that by certain acts the bank is dissolved, the suit still remains to the bank,³ and *a fortiori* to the receiver. Whatever rights are given to the corporation by law or by statute, such as the bank's rights to recover illegal dividends, can be enforced by the receiver.⁴ But it will happen that the receiver may be appointed in a suit brought by the stockholders,⁵ when the court will take cognizance of the whole matter, and in the one suit settle all the rights of the corporation involved by proper proceedings in that action.⁶ The corporation would be a necessary party to such suit. But after the receiver was appointed he could proceed to enforce the corporation's rights either in ancillary proceedings in the same action or in actions at law.⁷ In suits either by the representative of the corporation or by the corporation itself, there is no necessity of joining all the tort-feasors.⁸ To such suits the creditors are not proper parties.⁹ As to a compromise of such claims by the receiver, we give below a case.¹⁰

§ 82. Statutory liability of officers for debts.—There are some statutes which make officers liable for debts of the corporation. Such a liability is penal in its nature, to some

¹ *Schultz v. Christman*, 6 Mo. App. 338. the liability of officers either to stockholders or to creditors.

² *Butterworth v. O'Brien*, 39 Barb. 192. And see § 79, *ante*, notes 3, 4 and 5. ⁶ *Warren v. Fake*, 19 How. Pr. 430.

³ *Bank of Niagara v. Johnson*, 8 Wend. 645. ⁷ See *O'Brien v. Fitzgerald*, 143 N. Y. 347.

⁴ *Van Dyck v. McQuade*, 45 N. Y. Super. Ct. 620. ⁸ *Smith v. Rathbun*, 22 Hun, 150.

⁵ *Jones v. Johnson*, 86 Ky. 530, is a case of gross misapprehension of ⁹ *Kimball v. Ives*, 30 Hun, 568.

¹⁰ *Williams v. Halliard*, 14 Atl. R. 880.

extent, and does not arise out of contract.¹ But it will be enforced in another state.² The liability created is joint, and a director is liable even though he dissented.³ For the same reason a release of one director liable releases all.⁴ But the creditor need not join the personal representative of a deceased director,⁵ and need only join in the suit those who can be reached by process.⁶ In such case the action of debt lies against the officer.⁷ The officer liable cannot anticipate the creditor by buying up claims against the bank, since they are not proper matters of set-off, although it is held in one case that a claim against the bank by an officer can be set off by a claim against him for negligence.⁸

§ 83. Liability of officers to creditors.— We have already examined the liability to creditors established by statute in the last section. We come now to those rights which the creditor, without the aid of a statute, can enforce against the officers of the corporation. The creditor can sue the officer of the bank who commits a tort against him. But this action lies not because he is a creditor, for it would lie in favor of any person injured by a tort.¹ In the next place, some courts recognize that a creditor has certain rights which he can enforce against the officers of a corporation, where he sues in right of the corporation. Still other courts maintain the doctrine that a creditor can sue the officers of a corporation for negligence in the management of the cor-

¹ *Sturges v. Burton*, 8 Ohio St. 215; *Gregory v. German Bank*, 3 Colo. 333; *Ashley v. Frame*, 45 Pac. R. 927. *Contra*, *Banks v. Darden*, 18 Ga. 318; *Hargroves v. Chambers*, 30 Ga. 580. But see the next case cited.

² *Huntington v. Attrill*, 146 U. S. 657.

³ *Banks v. Darden*, 18 Ga. 318.

⁴ *Robinson v. Bealle*, 20 Ga. 275.

⁵ *Hargroves v. Chambers*, 30 Ga. 580.

⁶ *White v. How*, 3 McLean, 111; S. C., Fed. Cas. No. 17,548.

⁷ *Bullard v. Bell*, 1 Mason, 243, against a stockholder on a statutory liability.

⁸ *St. Louis School Dist. v. Broadway Bank*, 12 Mo. App. 104. *Contra*, *Ahl v. Rhodes*, 84 Pa. 319.

¹ The officer cannot shelter himself by saying that his act was outside of his duties as an officer. *Mt. Vernon Bank v. Porter*, 52 Mo. App. 244. This rule would apply also to suits by the bank, or its receiver, or by the stockholders.

poration. The national bank act introduces further complication, which will be noticed in proper sequence. No subject is rendered more obscure on account of loose language used by the courts, but it is believed that the principles which underlie the subject are plain, and ought to be easy of application.

§ 84. Relation of officers of a corporation to creditors.

Since the officer is merely an agent of the corporation he stands in the same relation to a corporation's creditor that the agent of an individual stands in relation to that individual's creditor, where the agent has managed the business for the individual who is his principal. Such is the plain proposition, and although the courts have befogged the subject such the relation must be. Such a situation discloses no fiduciary relation between the officer and the creditor, and none exists. But just as the creditor of an individual can sue that individual's agent for a fraud perpetrated by the agent, or for a malicious act amounting to a tort, so the creditor of the corporation can sue the corporation's officer for a tort perpetrated by him against the creditor. The common instance of this action is one for fraudulent misrepresentations or deceit. But the law also recognizes that the capital stock and assets of a corporation constitute the security of the corporation's unsecured creditor, just as the debtor's property is the sole security of the debtor's unsecured creditor; and since the officers of the corporation have no right to absorb or give away this capital stock or assets, where they commit culpable acts which cause loss to the corporation, the creditor can follow by a creditor's bill that capital stock or assets into the hands of any one who is not a purchaser for value, or, if the corporation's property has so passed, may hold those who were guilty of wrongful conduct in disposing of the corporation's property. This is simply the case of following by creditor's bill the assets of the debtor, or, if they cannot be followed, then it is the case of subjecting the debtor's rights of action against his wrongly acting agent to creditor's bill. These seem to be the correct

rules of law applicable to the subject. But courts have obscured the subject so much by fuliginous expressions in regard to bank directors being trustees for the creditors, and the capital stock of a corporation being a trust fund, that it is a devious work to find one's way among the cases.

§ 85. Liability to creditors for fraud.—When a bank officer makes a false and fraudulent representation to a man, whereby he becomes a creditor of, or a depositor in, a worthless or insolvent bank, and the creditor relies upon that fraudulent statement, the officer must respond in damages in an action of deceit.¹ But fraud may consist of a representation made either by words or by conduct. If bank officers, who control a bank, keep its doors open when it is insolvent, they thereby represent to every one who comes to the bank that it is competent to do business and a safe place to deposit money.² This latter case is simply the former case, but the

¹Seale v. Baker, 70 Tex. 283; Giddings v. Baker, 80 Tex. 308; Prescott v. Haughey, 65 Fed. R. 653; Solomon v. Bates, 118 N. C. 311. Since this liability exists against the director, not as officer, but as an individual, a forfeiture of the bank charter is wholly immaterial. Hargroves v. Chambers, 30 Ga. 580. Such fraudulent representations may be contained in published reports. Merchants' Nat. Bank v. Thomas, 28 Wkly. Law Bul. 164. It has been said that the bank itself is not liable for the directors' false statements as to the condition of the bank, where a man loaned money on the stock of the bank. Merchants' Nat. Bank v. Armstrong, 65 Fed. R. 932. Whether a director would be liable would depend in such case upon whether the party had a right to rely on the statement as one to himself. The director is liable even though he

resided away from the bank's location. Houston v. Thompson, 29 S. E. R. 827. If the director attests a report he is liable to one who acted on it, regardless of his knowledge. Gerner v. Mosher, 78 N. W. R. 384.

²St. Louis & S. F. Ry. Co. v. Johnston, 133 U. S. 566, and the cases cited therein; Craigie v. Hadley, 99 N. Y. 131; Townsend v. Williams, 117 N. C. 330; Miller v. Howard, 95 Tenn. 407; Delano v. Case, 17 Bradw. 531; Higgins v. Hayden, 73 N. W. R. 280. See under a statute, Cummings v. Spannhorst, 5 Mo. App. 21; Cummings v. Winn, 89 Mo. 51. The statute may make a failure within thirty days *prima facie* evidence of an intent to defraud. Am. T. & S. Bank v. Manuf. Co., 150 Ill. 336. Since such a statute is simply declaratory of the common law, it is nothing but an instance of judicial density to call it a penalty, as it is

representation is by conduct and not by express words.³ If the officer knew, or ought to have known, or through negligence did not know, of the bank's condition he is guilty of the misrepresentation.⁴ However in the preceding ways, he made the representation, he will not be heard to say that he did not intend to defraud.⁵ A bank is not insolvent under this rule as long as it is meeting its liabilities in due course of business and there is an expectation entertained on reasonable grounds of belief by those who are familiar with its business that it will continue to meet its obligations.⁶ The action above some courts in their confusion have called negligence or gross negligence,⁷ while others have called it the violation of a trust duty which the officers owed to the depositor.⁸ But the slightest analysis shows that it is neither, but simply an action of deceit. To such a case, it being a tort committed by the officer against the depositor, the cor-

called in *Ashley v. Frame*, 45 Pac. R. 927. There was a statute which was wholly useless and was a correct statement of the common-law principle, yet the court had the hardihood to declare the liability created a penalty.

³ See *Rochester Printing Co. v. Loomis*, 45 Hun, 93, 120 N. Y. 659.

⁴ *Delano v. Case*, 17 Bradw. 531; *Baxter v. Coughlan*, 72 N. W. R. 797; *Cassidy v. Uhlman*, 50 N. Y. Supp. 318. Negligence in not knowing is the same as knowledge. *Wolf v. Simmons*, 23 S. R. 586. The case of *Pierrat v. Young*, 49 S. W. R. 694, failed to notice this fact.

⁵ *Seale v. Baker*, 70 Tex. 283; *Giddings v. Baker*, 80 Tex. 308; *Gerner v. Mosher*, 78 N. W. R. 384. But the allegation must show a reliance upon the representation. *Baker v. Ashe*, 80 Tex. 356. And it seems the allegation must be that the depositor would have withdrawn his deposit, not that he

allowed it to remain. *Pierrat v. Young*, 49 S. W. R. 964; *Brady v. Evans*, 78 Fed. R. 558.

⁶ *Minton v. Stahlman*, 96 Tenn. 98. This case is unsound on another point.

⁷ *Hodges v. Screw Co.*, 1 R. I. 312; *Savings Bank v. Caperton*, 87 Ky. 806.

⁸ *Delano v. Case*, 17 Bradw. 531, 121 Ill. 247. It must have been an exceedingly astonishing thing for the attorneys for the plaintiff who carefully drew a declaration based upon deceit, which is an admirable precedent in its way (see 17 Bradw. 531), to find themselves allowed to recover because they sued for a breach of trust. How the court could make such an absurd error in a state where the common law and chancery jurisdictions are kept separate almost surpasses belief. All judges ought to know the remedies for breaches of trust are equitable.

poration or its receiver need not be made a party⁹ unless the depositor or creditor so injured desires to hold the bank also responsible as a joint tort-feasor. Many and various may be the phases of such an action against officers of a bank, and they would all be governed by the same rule.¹⁰ The foregoing principles apply also to national banks. They are wholly independent of statutes, for they exist by force of the common law.¹¹ The corporation or its receiver has nothing to do with this action.¹²

§ 86. Liability of officers to creditors for negligence and illegal acts.—A bank officer is a trustee for the bank, and in the performance of that trust may be guilty of violations of the trust that make him responsible to the bank, or those officers whose duty it is to supervise the affairs of the bank may, as heretofore seen,¹ be guilty of negligence in supervision, whereby the injury to the corporation takes place. Such acts dissipate the property of the bank; its creditors have the right to follow that property, but since it cannot usually be followed, the creditors may by a creditors' bill, enforce their claim upon what the corporation has left, which is simply a right of the bank to hold the officers liable in damages for a breach of trust. Those rights of the bank are choses in action, which are equitable assets in the sense that they are rights to recover for breaches of trust. They are assignable, and survive against the personal representative of the deceased officer.² But the judi-

⁹ *Solomon v. Bates*, 118 N. C. 311; *Tate v. Bates*, 118 N. C. 237. The court reached a correct result, although it did not seem to understand the nature of the action at all. The text-writers only serve to add to the confusion.

¹⁰ The confusion of the text-writers is extreme. Take the case proposed by 3 *Thomp. Corp.*, secs. 4138, 4139. The directors could be sued under this section for deceit.

¹¹ *Prescott v. Haughey*, 65 Fed. R.

353. The uselessness of statutes upon this matter is apparent. The common law presents a full remedy. Its deficiencies are due to the ignorance of those who apply it.

¹² They cannot release the liability. *Mallon v. Hyde*, 76 Fed. R. 388; *Houston v. Thompson*, 29 S. E. R. 827; *Barnes v. Poque*, 29 *Wkly. Law Bul.* 382; and see § 334, *post*, note 12.

¹ See § 79, *ante*.

² *Wilkinson v. Dodd*, 41 N. J. Eq.

cial mind has nowhere shown itself of a higher specific gravity than in dealing with this question. Judges have become confused as to the trust between the bank and its officers and the creditor's right to enforce the trust. Thus some courts have triumphantly demonstrated that there is no trust relation between the bank officers and its creditors, and thought that they have thus disposed of the question;³ but, as a matter of fact, they have not touched it, because the creditor's right is not founded upon a trust, but is based upon his rights to have the bank assets. On the other hand, we find courts insisting that there is a right in the creditor to claim that the bank is a trustee for him, and that in this action he sues for a breach of that trust.⁴ But if that is

566; *Stephens v. Overstolz*, 43 Fed. R. 771. Some courts and law writers may find difficulty, because of the fact that the breach of duty on the part of the officer consists of negligence in the performance of his duties, and hence such a right of action might not be assignable. But this consideration overlooks the fact that the negligence is a breach of trust towards the beneficiary, which is the bank, and the right to recover for a breach of trust was never governed by the rules of the common law, but by the rules of equity. Such rights of the beneficiary were always assignable and are one of the accompanying circumstances of an equitable estate. They not only survive to the heirs of the beneficiary, but they survive against the personal representative of the trustee. No difficulty, therefore, can be met from this phase of the question.

³ Thus *Dedrick v. Bank of Commerce*, 45 S. W. R. 786, is an admirable disquisition proving that the

officers of a bank are not trustees for creditors of the bank. Therefore, the opinion concludes, the action does not lie, because it is for a breach of trust. It must have been painful to the plaintiff's attorneys, who drew an admirable creditor's bill, to find that the court could not understand that they were trying to enforce the bank's rights against the bank's trustees. The same remark applies to *Union Nat. Bank v. Hill*, 49 S. W. R. 1012 (Mo.). So, in *Foster v. Bank of Abingdon*, 88 Fed. R. 604, the court totally misconceives what the case was about, but makes a correct decision.

⁴ *Marshall v. Farmers' Bank*, 85 Va. 676; *Savings Bank v. Caperton*, 87 Ky. 306; *Banning v. Loving*, 82 Ky. 370; *Conant v. Bank*, 1 Ohio St. 298, and *Morse on Banking* (2d ed.), 133, all show this misconception at its worst. See § 84, *ante*. These authorities appear to think that this action lies at law, and the law has been so wrenched from its moorings by crude thought upon this subject that the action at law

true, the fruits of the litigation would not be assets for the bank, but would belong to the creditors. Again, this right of the creditor can never be insisted upon except when the bank is insolvent, for as long as the bank is able to pay, and does pay, its creditors, no creditor is injured by or can complain of the officer's breach of his duty toward the bank. But the bank being insolvent, two principles come into play: first, the assets ought to be equally distributed among the creditors; and second, the suit being a creditors' bill, all creditors have a right to come into the action, and must come into that action. This fact being conceded, the necessity for a judgment at law and a return of "*nulla bona*" is dispensed with.⁵ Such being the nature of the action, it is quite useless for us to say that without a statute such an action does not lie at law;⁶ because no creditor's bill lies at law. But since the right against the officer which the creditor is asserting belongs to the bank, the corporation must be made a party,⁷ just as the debtor whose rights are being asserted must be made a party. In the next place, if the bank has an assignee or a receiver, he must be made a party,⁸ because the bank's choses in action belong to him; and since he is the custodian of those rights,

has been held to lie for this cause of action. In *Warren v. Robison*, 57 Pac. R. 287, where the suit was by both creditors and stockholders, the court actually proposed contributory negligence as a defense.

⁵ This follows from the principle stated in § 61, *ante*; and *Cunningham v. Pell*, 5 Paige, 607, shows the propriety of bringing the action on behalf of all creditors, because the fruits of the litigation are corporate assets. But the *dicta* in *Collins v. Brierfield Coal Co.*, 150 U. S. 371, would seem to require a judgment. But a judgment in such a case would be entirely useless.

⁶ *Funz v. Spanhorst*, 67 Mo. 256; *Vose v. Grant*, 15 Mass. 505; *Harris*

v. Dorchester, 23 Pick. 112. And see note 4 to this section.

⁷ *Chester v. Halliard*, 36 N. J. Eq. 313. The court of New Jersey has done much to explain this question.

⁸ *Hand v. Atlantic Bank*, 55 How. Pr. 231. The case of *Solomon v. Bates*, 118 N. C. 311, was an action for deceit, and hence was rightly decided. So was the case of *Foster v. Bank of Abingdon*, 88 Fed. R. 604, rightly decided, because the suit was not by stockholders. The case of *Robison v. Warren*, 57 Pac. R. 287, inferentially decides otherwise (see note 5 to the preceding section); but the court, in its opinion, displays such an amazing misconception of the nature of this

if he is a receiver, an officer of the court, no suit ought to be brought unless he has refused to bring a suit and thus renounced his intention of enforcing the obligation on behalf of the bank.⁹ But since a creditor need not make a demand upon his debtor to enforce his choses in action, so the creditor of the bank need not, under the ninety-fourth equity rule, make a demand upon the bank to sue.¹⁰ The action being equitable, it should be brought by one creditor on behalf of all.¹¹ Since the court of equity can mould its decree, the creditor may unite all rights which he is insisting upon, both those which he is enforcing in right of the bank, and rights which he claims on account of fraudulent representations made by the bank officers to his injury.¹² The bill is not multifarious, because the defendants are not all equally liable, or are not liable upon the same act.¹³ The fruits of the litigation where the bank's choses in action are enforced are assets of the bank for the purpose of distribution among its creditors.¹⁴ The laches of the bank would

action that it is forced upon us to say that the most charitable construction to put upon that case is that, although it was a bill in equity, the court thought it was a common-law action for breach of duty.

⁹ *Ackerman v. Halsey*, 37 N. J. Eq. 356; *Hand v. Atlantic Bank*, 55 How. Pr. 231; *Nelson v. Burrows*, 9 Abb. N. C. 280. The case of *Ex parte Chetwood*, 165 U. S. 443, recognizes the principle as a proper one. *Brinckerhoff v. Bostwick*, 88 N. Y. 52. And see § 80, note 2, for the principle as applied to stockholders.

¹⁰ *Foster v. Bank of Abingdon*, 88 Fed. R. 604. The reasoning of the court is absolutely beside the question. So it is in *Solomon v. Bates*, 118 N. C. 311; *Tate v. Bates*, 118 N. C. 287, but they are correctly de-

cided. See, however, the authorities in the last note; and *Howe v. Barney*, 45 Fed. R. 668; *National Ex. Bank v. Peters*, 44 Fed. R. 13, say the suit cannot be brought by creditors at all if there is a receiver. But see last note.

¹¹ *Cunningham v. Pell*, 5 Paige, 607, and note 5, *supra*.

¹² *Foster v. Bank of Abingdon*, 88 Fed. R. 604; *Tate v. Bates*, 118 N. C. 287; *Solomon v. Bates*, 118 N. C. 311. But it is wrong to permit such joinder, because of the difficulty of dividing by decree assets from what the plaintiffs individually own.

¹³ *Hayden v. Thompson*, 71 Fed. R. 60; *Stephens v. Overstolz*, 43 Fed. R. 771. But see *O'Brien v. Fitzgerald*, 143 N. Y. 347.

¹⁴ *Dewing v. Perdicaries*, 96 U. S. 193. But see note 12, *supra*.

be a defense against a suit by the creditors, because they can attain no higher rights than the bank has.¹⁵

§ 87. **National banks.**—In the case of national bank directors it is necessary to keep in mind that there are liabilities created by statute and liabilities that exist independently of any statute. Thus national bank directors are liable, just as any other bank officer or private person, for fraudulent representations by words or by conduct.¹ The bank or its receiver may sue the directors for mismanagement and misapplication of the funds of the bank.² The stockholders in a national bank may sue where the receiver or the corporation will not.³ The creditors may have the remedies that exist for the creditors of any other bank.⁴ But where the redress sought is for a violation of the national banking law, a court of appeal has erroneously held that the remedy given to the comptroller is exclusive, and can only be enforced by the receiver of the comptroller.⁵ But that receiver may bring the suit without an order from the comptroller.⁶ It is held further that where a remedy is sought in order to charge directors with a violation of the national banking act, under section 5239 of the Revised Statutes of the United

¹⁵ *Cooper v. Hill*, 94 Fed. R. 582. But the laches will not begin until the directors surrender control. *National Bank v. Wade*, 84 Fed. R. 10.

¹ *Prescott v. Haughey*, 65 Fed. R. 353; *Merchants' Nat. Bank v. Thoms*, 28 Wkly. Law Bul. 164. Withdrawal of a large deposit by a director is said to be by a remarkable effort of the judicial intellect cognizable at law, but not in equity. *Robinson v. Hall*, 59 Fed. R. 648. That is not true. It is an illegal preference which the receiver of the bank may recover. See § 327, *post*.

² *Robinson v. Hall*, 63 Fed. R. 222, 25 U. S. App. 48; *Warner v. Penoyer*, 91 Fed. R. 987. See § 81,

supra. *Hayden v. Thompson*, 71 Fed. R. 60, puts the suit on the ground of breach of trust. This is true where the corporation or its receiver sues. When the creditor sues, the right to recover, on whatever ground it is put, is not for a breach of trust toward the creditor, but a breach of trust toward the bank.

³ *Ex parte Chetwood*, 165 U. S. 443. See § 80, *supra*, and cases cited in note 3 to that section.

⁴ See § 86, *supra*.

⁵ *Hayden v. Thompson*, 71 Fed. R. 60. But this case must be considered as overruled by *Ex parte Chetwood*, 165 U. S. 443. See § 334, *post*.

⁶ *Hayden v. Thompson*, *supra*

States, no suit lies until forfeiture of the charter is made as provided in that act.⁷ This erroneous ruling in effect denies such remedies to either stockholders or creditors until a forfeiture has taken place, when, a receiver being already in possession, the suit would be useless. The rules of joinder of causes of action have been noticed in the preceding section. The directors cannot discharge their liability for any part of an illegal loan by showing that part of the loan was paid in illegal dividends.⁸ The statute of limitations or the defense of laches will not run in favor of the officers while they control the bank.⁹

§ 88. Release to directors.—The rule of law is, except where modified by statute, that the release of one joint tortfeasor releases all.¹ A release to one director jointly liable would be a defense to the action. Since the right to call its officers to account belongs to the corporation, except where the statute confers the right on some other party, the corporation can release its directors from liability to it, if the act be otherwise lawful. But such a transaction would be narrowly scanned by a court for evidences of fraud. If fraudulent it would be held for naught.² Compromises of the liability are not usually permitted.³

§ 89. Criminal liability of bank officers.—Certain acts in banking officers are offenses at common law, others are

⁷ Wells v. Graves, 41 Fed. R. 459; Gerner v. Thompson, 74 Fed. R. 125. These cases are no longer authority. Their absurdity is sufficiently apparent. Cockrill v. Cooper, 86 Fed. R. 7 (C. C. A.); National Bank v. Wade, 84 Fed. R. 10. And a fictitious increase of capital stock on a fictitious valuation of assets renders the directors liable. Cockrill v. Abeles, 86 Fed. R. 505.

⁸ Witters v. Sowles, 43 Fed. R. 771.

⁹ National Bank v. Wade, 84 Fed. R. 10.

¹ Cocke v. Jennor, Hob. 66, pl. 69.

See also, where a release is given to one with a reservation as to others, Solly v. Forbes, 2 Brod. & Bing. 38; Ruble v. Turner, 2 Hen. & Munf. 38; Matthews v. Manufacturing Co., 3 Robt. 711.

² A release after insolvency or suit brought would probably never be permitted to stand. The release by the directors to one of their own number or to an officer would be a fraud in itself.

³ Williams v. Halliard, 14 Atl. R. 880.

offenses under statutes. Where no common-law offenses exist, as under the United States law and under the criminal and penal codes of many states, the statute is the sole definition of the crime. But in states which recognize common-law offenses, that system must be looked to as well as the statutes in order to ascertain what acts are criminal.

§ 90. Receipt of deposits in insolvent bank.—Where a bank officer fraudulently represents his bank to be solvent and obtains a deposit, his offense has been defined to be the obtaining of money by false pretenses.¹ Insolvency under such statutes means that condition where the bank is unable to meet its liabilities as they become due in the ordinary course of business.² An exception is made in some statutes as to the receipt of a deposit where the depositor is indebted to the bank, but it must be such a deposit as the bank would have the right to appropriate to its claim.³ Such statutes have been held not to apply to private bankers.⁴ Making such an act a criminal offense in a private banker does not cause imprisonment for debt, nor does it deny to the banker the equal protection of the laws.⁵ The reasons why insolvency exists and the agency of the defendant in producing the condition is immaterial.⁶ The deposit need not be received in the banking rooms,⁷ nor by the defendant himself.⁸ The offense is committed by keeping the bank open and permitting the reception of deposits, knowing it to be insol-

¹ Commonwealth v. Schwartz, 18 S. W. R. 359, 19 S. W. R. 189. Exhibiting false books. People v. Helmer, 43 N. Y. Supp. 642. The rule applies to certificates of deposit. State v. Shore, 70 N. W. R. 312.

² State v. Caldwell, 79 Iowa, 432. Capital stock and surplus are considered resources. State v. Myers, 54 Kan. 206. See also Meadowcroft v. People, 163 Ill. 56.

³ State v. Beach, 43 N. E. R. 949; Nichols v. State, 46 Neb. 715. Com-

pare Commonwealth v. Scholl, 12 Pa. Co. Ct. R. 209. But it is no defense that the depositor can follow the deposit as a trust fund. State v. Eifert, 71 N. W. R. 248.

⁴ State v. Kelsey, 89 Mo. 623. Compare State v. Smith, 62 Minn. 540, and next case.

⁵ Commonwealth v. Sponsler, 16 Pa. Co. Ct. R. 116, reversed 170 Pa. 194; Baker v. State, 54 Wis. 368.

⁶ Carr v. State, 104 Ala. 4.

⁷ State v. Yetzer, 97 Iowa, 423.

⁸ State v. Caldwell, 79 Iowa, 432.

ent;⁹ but even the element of knowledge is dispensed with by some statutes.¹⁰ But if the officer forbids the reception of the deposit, he is not guilty,¹¹ unless he afterwards received it.¹² There is no necessity to allege in the indictment that any one was injured,¹³ but the fact of insolvency should be alleged as a fact and not inferentially.¹⁴ This offense is sometimes defined as the creating of indebtedness of the bank by receiving deposits while the bank was insolvent.¹⁵ A similar offense of fraud is perpetrated by selling a draft, knowing the drawer bank to be insolvent, and that before the draft can be cashed the fund against which it is drawn will be exhausted.¹⁶ In states requiring a popular vote to ratify a banking law, a statute defining a criminal offense as to banking does not need to be ratified by popular vote.¹⁷ Other matters of evidence are ruled upon in cases in the note.¹⁸

§ 91. Other offenses.—Statutes exist requiring returns to be made by bank officers, and a false return is defined to be perjury. The same offense is a false return in the case of national banks. The return is for the purpose of showing the condition of the bank. Even if it does not agree with the books, but is a fair showing of the condition of the bank, the officer is not guilty of perjury by verifying it.¹ It seems

⁹ Carr v. State, 104 Ala. 4; State v. Yetzer, 97 Iowa, 423. Compare State v. Eifert, 65 N. W. R. 309; Commonwealth v. Scholl, 12 Pa. Co. Ct. R. 209.

¹⁰ Murphy v. People, 19 Bradw. 125.

¹¹ Commonwealth v. Jenkins, 170 Pa. 194, reversing Comm. v. Sponsler, 16 Pa. Co. Ct. R. 116.

¹² State v. Eifert, 65 N. W. R. 309.

¹³ State v. Myers, 54 Kan. 206. An intention to return the deposit is no defense. Comm. v. Sponsler, 16 Pa. Co. Ct. R. 116. But if the identical thing deposited was returned and never mixed with the bank's

funds, no offense was committed. Comm. v. Jenkins, 170 Pa. 194.

¹⁴ State v. Bardwell, 72 Miss. 535. The word "unsafe" in a statute means insolvent as applied to banks. In re Koetting, 90 Wis. 166.

¹⁵ State v. Sattley, 131 Mo. 464.

¹⁶ Anonymous Case, 67 N. Y. 598.

¹⁷ In re Koetting, 90 Wis. 166.

¹⁸ State v. Beach, 43 N. E. R. 949; State v. Caldwell, 79 Iowa, 432; State v. Yetzer, 97 Iowa, 423; State v. Sattley, 131 Mo. 464; Nichols v. State, 46 Neb. 715.

¹ Comm. v. Dunham, Thacher Cr. Cas. 519. Compare United States v. Allen, 47 Fed. R. 696.

a fair proposition that the indictment should allege a false return was made wilfully, because the law does not punish mere mistake or ignorance.² If the return was made by the officer believing it to be true, but when it was in fact false, he would not be guilty.³ Such is the law of perjury. There are offenses connected with banks, such as converting money or bank bills or notes of the bank, and overdrawing an account by an officer. The offense of conversion of bank bills or notes in a statute has been held not to be committed by appropriating promissory notes or commercial paper of the bank.⁴ For the offense of overdrawing an account by an officer and wrongfully obtaining the money of the bank, it is necessary to show something more than a mere overdraft,⁵ although it is not necessary to allege an intent to defraud.⁶

§ 92. National bank returns.—The national banking law requires a return verified by the president or cashier of a national bank and attested by three directors to be made five times a year, and special reports at such other times as the comptroller of the currency may designate.¹ The form is designed by the comptroller, and the date of the call is never known until the call is made. Thus two kinds of reports are provided for, both upon call. Another section of the statute makes it an offense wilfully to make a false entry in such a return.² The entries are criminal when made with an intent

² *Comm. v. Dunham, supra*. Compare *Graves v. United States*, 165 U. S. 323.

³ See cases of false return in the next section.

⁴ *State v. Stimson*, 24 N. J. Law, 9. The phrase was "money, bank bill or note." The word "note," on the principle of *noscitur a sociis*, was construed bank note.

⁵ *People v. Clements*, 42 Hun, 286.

⁶ *State v. Stimson*, 24 N. J. Law, 478.

¹ Sec. 5211, R. S. U. S.

² Sec. 5209, R. S. U. S. On prin-

ciple the two kinds of reports ought to be discriminated. If the indictment was based upon an allegation of a report made to the comptroller, proof of either one of the regular five reports, or of a report on special call, would answer. But if the indictment alleged one of the five reports, proof of a report upon special call would be a variance. Because needless particularity of averment in an indictment where matter of description must be proven as alleged. This very point was made in *Bacon v. United States*, 97 Fed. R.

to deceive or defraud persons named in the statute. This statute therefore requires two intents: the first, the intent to make a false entry with knowledge of its falsity.³ It does not cover and is not intended to cover honest mistakes. It will be seen, therefore, that if a defendant is in fact ignorant of the falsity of the entry, whether his mistake arose from ignorance of fact or of law, he has committed no offense.⁴ Such a question must always be submitted to the jury, and if it is not, but the court assumes to say that the entry is false, its charge is erroneous.⁵ If the entry in the report is thus found to be wilfully false the second question arises: Was it intended to deceive or defraud?⁶ but that fact may be inferred from the wilful making of a false entry with knowledge of its falsity.⁷ The charge must be the intent to deceive one of the persons named in the statute; an intent to deceive the comptroller of the currency is insufficient.⁸ The report must be one of the reports named in the statute; a report made to a bank examiner, which it is not the duty of the officer to make, will not support an indictment.⁹ The

35, but the court ignored it or refused to notice it at all. The record shows that the point was made. See *United States v. Hughitt*, 45 Fed. R. 47. *United States v. Booker*, 80 Fed. R. 376, wrongly holds that the report need not be a report mentioned in sec. 5211, R. S. *Bacon v. United States*, 97 Fed. R. 35, so holds also, but the statement is dictum, for it appeared that the report was a report covered by sec. 5211.

³ *Graves v. United States*, 165 U. S. 323; *United States v. Allis*, 73 Fed. R. 165; *United States v. Allen*, 47 Fed. R. 696; *United States v. Graves*, 53 Fed. R. 634.

⁴ This is the effect of *Graves v. United States*, 165 U. S. 323, and *United States v. Allis*, 73 Fed. R. 165. But *United States v. Allen*,

holds somewhat different language. See 47 Fed. R. 696.

⁵ *Graves v. United States*, 165 U. S. 323.

⁶ *United States v. Means*, 42 Fed. R. 599; *United States v. Allis*, 73 Fed. R. 165. The intent must be proven as alleged. *United States v. Allen*, 47 Fed. R. 696.

⁷ *United States v. Harper*, 33 Fed. R. 471. The principle stated in that case applies here.

⁸ *United States v. Bartow*, 10 Fed. R. 874. Compare *United States v. Allis*, 73 Fed. R. 165.

⁹ *United States v. Ege*, 49 Fed. R. 852. It must be averred that the report was verified by proper officer. *United States v. Potter*, 56 Fed. R. 97. See also note 2 to this section for cases *contra*, which are *United States v. Booker*, 80 Fed. R.

persons named in the statute alone are indictable, not the directors who certify,¹⁰ although they may be indicted as aiding and abetting the act.¹¹ The form of the report is the regular blank form. It provides for the entry of totals of the various resources of the bank and the various liabilities. Loans and discounts are under one head, overdrafts secured and unsecured under other heads. Under the various heads are provided subdivisions for the loans and discounts upon which officers of the bank are liable, and for overdrafts of officers or upon which they are liable.¹² Suspended loans may be entered under the head of loans and discounts.¹³ Unmatured and contingent liabilities must be shown in the report.¹⁴ But difficult questions arise as between loans and discounts and overdrafts. Cases have arisen where overdrafts so called have been reported among the loans and discounts. This may be caused by the fact that they have been arranged for verbally, or that the customer has given a note to the bank for a certain amount secured by an indorser or sometimes not, wherein the parties promise to pay the overdraft with a rate of interest above the legal rate, with collection charges and attorney's fees. The two cases differ in this: The arrangement in the one case is verbal, in the other is evidenced by a writing; but both make a con-

376, and *Bacon v. United States*, 97 Fed. R. 35. This last case does not notice *United States v. Ege*, *supra*, and *United States v. Potter*, *supra*.

¹⁰ *United States v. Potter*, 56 Fed. R. 97. *Contra*, *United States v. Means*, 42 Fed. R. 599. But it is held in *United States v. Hughitt*, 45 Fed. R. 47, that the indictment need not aver that the report was made pursuant to a call, or upon a form prescribed, or at a time called by the comptroller. This case is wrong. See notes 2 and 10 to this section.

¹¹ *United States v. Potter*, 56 Fed. R. 97.

¹² In both *United States v. Allis*, 73 Fed. R. 165, and *United States v. Graves*, 53 Fed. R. 634, which are charges to juries, long disquisitions will be found upon these reports and kindred matters. Both charges are very good examples of what a judge ought to avoid in charging the jury. They are full of bold assertion and irrelevant rhetoric that would be pardonable in a "stumpspeech," but not in a charge to a jury.

¹³ *United States v. Graves*, 53 Fed. R. 634.

¹⁴ *Cochran v. United States*, 157 U. S. 286.

tract differing from an overdraft pure and simple, which does not draw interest unless a course of dealing or custom makes it draw interest. Now it seems plain that if the officer making the report honestly thought that the overdrafts had become loans he was guilty of no offense, because it was an honest mistake.¹⁵ In the first case it has been held that the overdraft remained as a matter of law an overdraft, despite the verbal arrangement.¹⁶ But in the second case the transaction is certainly a loan, although it is not a discount. It is a contrivance of the borrower to avoid paying interest on any more money than he has use for. The contract of the parties is determined by the note, and the overdraft is simply evidence of the amount due on the note. The indorser, if there be one, could only be held by virtue of the writing. But such transactions would appear on the books simply as overdrafts. The demand notes could not be entered among the bills receivable of the bank, because the amount due would vary from day to day. Yet this makes no difference, because the report ought to show the actual facts; it may agree with the books or not.¹⁷ The books ought not to be evidence against the officer as admissions, unless he kept the books or directed the form of entries in the books,¹⁸ although they would be evidence if proved to be entries in due course of business with the suppletory oath of the person who made the entries that they were correct.

¹⁵ This is the effect of *Graves v. United States*, 165 U. S. 323, and *United States v. Allis*, 73 Fed. R. 165. See § 150, *infra*.

¹⁶ *United States v. Allis*, 73 Fed. R. 165. But *Graves v. United States*, 165 U. S. 323, while not plain upon this point, seems to decide the contrary. Now the circuit court of appeals, in a very poorly considered and reasoned opinion, has practically refused to follow *Graves v. United States*, *supra*. See the opinion of *Bacon v. United States*, 97 Fed. R. 35.

¹⁷ *United States v. Allen*, 47 Fed. R. 696; *Commonwealth v. Dunham*, Thach. Cr. Cas. 519. But *Bacon v. United States*, 97 Fed. R. 35, holds that the books are admissible without the suppletory oath, as against any officer of the bank, and are presumably correct, and seemingly holds that the books control the facts.

¹⁸ He may be indicted for an entry made by his direction. *United States v. Youtsey*, 91 Fed. R. 864. *Bacon v. United States*, 97 Fed. R. 35, does not agree with the text.

Therefore the conclusion seems plain, in spite of a decision to the contrary, that overdrafts so called, which are evidenced by demand notes, are properly returnable as loans and discounts,¹⁹ but if so returned out of caution they should be accompanied by an explanation stating the facts. The jurisdiction of this offense is in the United States courts,²⁰ but the same act may constitute a crime against the state authority.²¹ Certain matters as to the evidence have arisen in the cases which are cited in the note.²² False entries are

¹⁹ *United States v. Allis*, 73 Fed. R. 165, seems to so hold when carefully examined. *Potter v. United States*, 155 U. S. 438, recognizes this defense as to certifying a check, where there were no funds. It is said to be the uniform course of national bankers to call such overdrafts loans and discounts. But now *Bacon v. United States*, 97 Fed. R. 35 (C. C. A.), holds that such loans must be returned as overdrafts. The court, in its opinion, makes the test of overdraft to be the state of the depositor's account. But it misses the real point, which is, that if the depositor has been given a credit up to the amount of the overdraft note, he has the right to compel the bank to pay his checks up to the amount of his credit. It is a misnomer to call such a loan an overdraft, because it is of the essence of an overdraft that it is an authority revocable at any time. Conceding that the authority given is the right to overdraw the apparent balance shown by the books, it is nevertheless binding upon the bank, if the directors permit or authorize an officer to permit it. The consideration making it binding is the making and delivery of the demand

note. Hence, if the bank should dishonor the depositor's check, he could sue the bank for damages, and, therefore, such a credit cannot be an overdraft, and *Bacon v. United States* is a total misconception. Yet because a bank president had returned such loans as loans and not as overdrafts, he was sentenced to the penitentiary for seven years. The ferocity of the sentence staggered the upper court. Since this note was first written, the present and the last comptrollers have recommended the defendant's pardon. In his report upon the case the present comptroller says the return was properly made. The attorney-general stated that he could not understand how any reasonable human being could find that the defendant had been guilty of any offense. The defendant (plaintiff in error) was therefore pardoned in order to remedy this frightful miscarriage of justice, wholly caused by an inexcusable blunder as to the law.

²⁰ *In re Eno*, 54 Fed. R. 669.

²¹ *Hoke v. People*, 122 Ill. 511.

²² *Allis v. United States*, 155 U. S. 117; *United States v. Allen*, 47 Fed. R. 696; *United States v. Graves*, 53 Fed. R. 634; *United States v.*

practically the same kind of offenses as false returns, as the cases cited to this section show.

§ 93. Embezzlement and misapplication of funds.—The statute directed against the embezzlement, abstraction or wilful misapplication of the funds of a national bank by its officers creates three distinct offenses,¹ which cannot be mingled in one count charging more than one separate and distinct offense.² The jurisdiction of these offenses is in the circuit court of the United States.³ But persons not officers of the bank are indictable as aiders and abettors.⁴ The offense of abstracting the funds may be begun in one jurisdiction and completed in another so that the offender becomes indictable in the latter jurisdiction.⁵ These offenses require an intent to defraud,⁶ but the intent may be inferred from a wilful doing of an illegal act,⁷ and is also to be inferred from an act of embezzlement,⁸ the indictment for which, if good as an indictment for embezzlement, would be held sufficient. The offense of abstraction of the funds may be laid without using the technical words necessary to charge larceny,⁹ but if the words of the statute are used the manner of abstraction ought to be alleged.¹⁰ This offense is so close to that of misapplication of the funds that it is difficult always to separate them. Whatever qualifying or excepting clauses there are in the statute as to either this offense or that of misap-

Harper, 33 Fed. R. 471. As to indictment, see *United States v. French*, 57 Fed. R. 382.

¹ *United States v. Lee*, 12 Fed. R. 816.

² *United States v. Cadwallader*, 59 Fed. R. 677.

³ *United States v. Buskey*, 38 Fed. R. 99. But embezzlement of the property of a depositor in a national bank is punishable by the state. *State v. Tuller*, 34 Conn. 280.

⁴ *Coffin v. United States*, 156 U. S. 432, 162 U. S. 664.

⁵ *Putnam v. United States*, 162 U. S. 687.

⁶ *United States v. Voorhees*, 9 Fed. R. 143; *United States v. Britton*, 108 U. S. 199.

⁷ *United States v. Harper*, 33 Fed. R. 471.

⁸ *In re Van Campen*, Fed. Cas. No. 16,835; *United States v. Lee*, 12 Fed. R. 816.

⁹ *United States v. Northway*, 120 U. S. 327.

¹⁰ *United States v. Britton*, 108 U. S. 199; *United States v. Eno*, 56 Fed. R. 218.

plication must be negatived in the indictment.¹¹ The making of an injudicious loan is said not to be a criminal offense under this section of the law.¹² A definition of the offense was attempted in the statement that it meant knowingly applying the funds of the bank in a manner forbidden by statute, whether the officers of the bank knew of the act or not.¹³ But this definition is not correct, for it is held that neither the declaration of an illegal dividend, nor a conspiracy alleged to have for its object the declaration of an illegal dividend, are offenses under this statute;¹⁴ nor is the conversion of the funds of the bank in making an illegal purchase of its own shares,¹⁵ nor in making an improvident loan to an officer,¹⁶ nor the permission to an officer to overdraw his account with knowledge on the part of the association.¹⁷ It seems that any act ratified by the association cannot be a misapplication of its funds.¹⁸ It is said to mean a misapplication of the funds to the use of some other person than the banking association.¹⁹ The result is that it is very difficult to tell what this statute means.²⁰ If the president of a bank should unload upon it worthless loans, which the board of directors should accept, he would be guilty of an offense under this statute.²¹ Overdrawing with knowledge that the checks are to be fraudulently paid and concealed by the teller would be an offense.²² A cashier making loans to himself upon the notes of insolvent makers²³ commits a violation of the statute. But the

¹¹ Both cases last cited apply in principle.

¹² *United States v. Harper*, 33 Fed. R. 471.

¹³ *United States v. Taintor*, 11 Blatchf. 374.

¹⁴ *United States v. Britton*, 108 U. S. 199.

¹⁵ *United States v. Britton*, *supra*.

¹⁶ *United States v. Britton*, *supra*.

¹⁷ *United States v. Warner*, 26 Fed. R. 616.

¹⁸ *United States v. Warner*, *supra*.

¹⁹ *United States v. Britton*, 108 U. S. 199. There must be a with-

drawal or conversion of the funds. Renewals are not a conversion. *Mohrenstecker v. Westervelt*, 87 Fed. R. 157.

²⁰ For matters in regard to the indictment see *Claasen v. United States*, 142 U. S. 140; *Evans v. United States*, 153 U. S. 584; *Batchelor v. United States*, 156 U. S. 426.

²¹ *Agnew v. United States*, 165 U. S. 36.

²² *United States v. Kenney*, 90 Fed. R. 257.

²³ *United States v. Youtsey*, 91 Fed. R. 864.

mere payment of checks upon overdrafts does not prove necessarily a fraudulent appropriation.²⁴ But at any rate the *dicta* in *United States v. Britton* have been considerably modified.

§ 94. Other offenses concerning national banks.—The wrongful certifying of a check where the depositor has not sufficient funds in the bank to meet the check is an offense, but a secured overdraft may be money on deposit.¹ The forgery of a promissory note for the purpose of deceiving the bank examiner is not a forgery to defraud the United States under section 5418 of the Revised Statutes.² For technical matters in regard to the form of an indictment for wrongfully certifying a check, the cases referred to in the note are authorities.³

ARTICLE II.—REPRESENTATION OF BANK BY ITS OFFICERS.

§ 95. The general principle.—The law relating to the powers of bank officers, or indeed any corporate officers, is but a development of the law of principal and agent. The rule is that the agent can bind his principal in regard to any act done within the scope of the agent's authority. The extent and scope of the authority in the case of a bank officer depend upon the provisions of the general law, the provisions of the special charter if there be one, the provisions of the articles of agreement, where the organization is made thereby, the nature and character of the office, the general usages and customs, which are a part of the business of banking, which define the power and authority annexed to a particular office, and the power and authority given to a particular office by a particular course of dealing in a particular bank. Certain modifications arise from a condition

²⁴ *Dows v. United States*, 92 Fed. R. 904.

¹ *Potter v. United States*, 155 U. S. 438.

² *Cross v. North Carolina*, 132 U. S. 131.

³ *United States v. Potter*, 56 Fed. R. 83; *Potter v. United States*, 155 U. S. 438.

fact when the officer is acting in regard to his own private interests as well as those of the bank, and when the same officer is acting for some other person or corporation dealing with the bank, and when the third person has or has not knowledge of the want of authority. The subject is further modified by the principles of acquiescence and delay in objecting to an officer's unauthorized act, or a ratification thereof by the corporation. The questions of admissions made by corporate officers as to corporate transactions require examination; and finally the subject of notice of a act given to a corporation through its officers—a subject which is also modified by the fact that a corporate officer may be interested in a transaction in regard to which notice is sought to be imputed to the bank through that officer's knowledge. These various subjects will be examined in order.

§ 96. General scope of authority.—The officers of a bank are held out to the public as having the general power to bind the bank according to the powers of the office as fixed by the general law and by the charter or the instrument that stands therefor,¹ as well as by the by-laws of the bank when they are known to the person dealing with the bank.² They are also represented by the bank to have the powers which are annexed to the particular office by the general usages and course of business applying to banks.³ This general scope of authority the bank may modify as it pleases by reducing the power of its corporate officers, unless forbidden to do so by the general law and the governing instruments of incorporation; and any one who has knowledge of the corporate agent's lack of authority in doing a particular act cannot rely upon that act as against the corporation.⁴

¹ Reed v. Powell, 11 Rob. (La.) 98.

² Mechanics' Bank v. Smith, 19 Johns. 115.

³ Lloyd v. West Branch Bank, 15 Pa. 172; Miner v. Mechanics' Bank, 1 Pet. 46; Eastman v. Coos Bank, 1 N. H. 23; Neiffer v. Bank of Knox-

ville, 1 Head, 162; First Nat. Bank v. Kimberlands, 16 W. Va. 555. This is so even in *quo warranto* without a special restriction. State v. Comm. Bank, 5 Smedes & M. 218.

⁴ Savannah Bank v. Hartridge, 73 Ga. 223; Stallcup v. Nat. Bank of

Persons dealing with a corporation are presumed to know the powers given to its agents by the general law and by the governing instruments of incorporation, the special charter or the articles of agreement.⁵ They are presumed to know the powers which general custom and usage have given to a particular officer in the bank.⁶ Granted, however, that the person dealing with the bank has no notice of the lack of the agent's power, and that the person claimed to be acting for the corporation is really its agent, for of course the bank is not responsible for the act of a person who is not acting for it,⁷ he may rely upon the agent's act, if it is not contrary to law and is within the general scope of the agent's usual authority. If the agent is forbidden by law to do the act, the person dealing with the corporation can have a remedy only as pointed out in sections 32 and 27, *ante*, unless he can show a ratification or estoppel. If the act be merely beyond the corporate power, the remedy is to be sought according to the rules of section 33, *ante*, but modified by matters of acquiescence, delay or ratification by the corporation.⁸ It is needless to say that a general law which imposes a disability to act upon corporate officers renders the act unlawful and void.⁹ But in connection herewith it is to be noticed that statutes or charters which require all bills, bonds, notes and all other contracts or agreements of a bank to be signed by one officer and countersigned by another are held upon principles of business necessity not to apply to the acts usually performed by the cashier.¹⁰ The

Republic; 15 N. Y. St. R. 39; Smith v. Lawson, 18 W. Va. 212.

⁵ This is the principle which governs the doctrine of *ultra vires*. See § 33, *supra*.

⁶ Farmers' Bank v. Troy Bank, 1 Doug. 459.

⁷ Thacher v. State Bank, 5 Sandf. 121. On this ground the bank is not responsible for the act of a notary hired by it to protest a note, in making a malicious publication of

the protest (May v. Jones, 88 Ga. 308), or for a cashier's slander. Etting v. Comm. Bank, 7 Rob. (La.) 459.

⁸ See §§ 105, 106, 109, *infra*.

⁹ Atkinson v. Roch. Printing Co., 114 N. Y. 168, a decision which contains some very erroneous *dicta* on the ruling of trust funds.

¹⁰ Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326; Northern Bank v. Johnson, 5 Cold. 88; Merchants' Bank v. Central Bank, 1 Ga.

old theory was that the act of an officer in doing something forbidden by law would not make the bank responsible unless the corporation adopted or ratified the act;¹¹ but this theory is wholly exploded as to torts committed in the corporation's business, and the doctrine of the Supreme Court of the United States is that an act prohibited by law, where it is relied upon as a contract, cannot be ratified by the corporation or made the basis of an estoppel.¹²

§ 97. Board of directors.—A board of directors is not an adjunct of a private bank, unless it be a joint-stock company, but sometimes a private bank has what is called a discount or loan committee. A board of directors, it has been said, is not necessary to a corporation,¹ but it is believed that now no corporation for banking purposes exists without a body of officers corresponding thereto, whether they are called directors, governors or trustees. The directors acting as a board² are charged with all the corporate power.³ They may deal with the bank's property and transfer it in whole or in part.⁴ They may release its obligations⁵ and compromise its claims.⁶ They may loan its funds⁷ and borrow

418; *Casey v. McDonald*, 7 Ga. 84. And a bank may contract through other officers. *Dana v. Bank of St. Paul*, 4 Minn. 385.

¹¹ *Clark v. Metropolitan Bank*, 3 Duer, 241.

¹² See §§ 32 and 33, *supra*. A tort by officers of the corporation, committed on its business, while it makes the corporation responsible for compensatory damages, will not necessarily render it liable for exemplary damages. See *Lake Shore Ry. Co. v. Prentiss*, 147 U. S. 101, and *Goddard v. Grand Trunk Ry.*, 57 Me. 202.

¹ *Gillett v. Campbell*, 1 Denio, 520.

² Acting individually when not specially authorized, the directors are not agents or officers of the

bank. *Louisiana State Bank v. Senecal*, 13 La. 525; *Hughes v. Bank of Somerset*, 5 Litt. 45; *Harper v. Calhoun*, 7 How. (Miss.) 203; *East River Bank v. Hoyt*, 41 Barb. 440.

³ *Percy v. Millaudon*, 3 La. 568; *Burrill v. Nahant Bank*, 2 Met. 163.

⁴ *Descombes v. Wood*, 91 Mo. 196; *National Bank v. Shumway*, 49 Kan. 224; *Cross v. Rowe*, 23 N. H. 77. See also note 17.

⁵ *Olney v. Chadsey*, 7 R. I. 224; *Lewis v. Eastern Bank*, 32 Me. 90.

⁶ *Wolf v. Bureau*, 1 Mart. (N. S.) 162; *Baird v. Bank of Washington*, 11 S. & R. 411. Their fraud is immaterial as to one who acted in good faith. *Frankfort Bank v. Johnson*, 24 Me. 490.

⁷ *Leavitt v. Yates*, 4 Edw. Ch. 136.

money.⁸ They may pledge the faith of the bank where the act is not *ultra vires*,⁹ define the authority of its officers,¹⁰ employ and empower its officers and agents to do anything the board could lawfully do;¹¹ may delegate certain powers to a committee whose acts will bind the bank.¹² They may ratify acts of officers done without authority,¹³ unless they are acts which the board itself could not lawfully do or authorize to be done. They may authorize by their conduct a particular course of dealing beyond an officer's general authority,¹⁴ and they may make the bank liable by their negligence in keeping a dishonest officer,¹⁵ or by keeping silent when it is their duty to speak.¹⁶ They have the power finally to make a general assignment of the bank's property for the benefit of creditors,¹⁷ or they may authorize and direct a certain officer to do it; and they may in such an assignment, if the act be not forbidden by law, make preferences among creditors if the same be not fraudulent.¹⁸

§ 98. **President.**—The president is one of the general executive officers of a bank, but in the case of banking presidents a very restrictive rule is put upon their powers. It is agreed that he has the power to control and direct the liti-

⁸ *Western Nat. Bank v. Armstrong*, 152 U. S. 346.

⁹ *State v. Bank of La.*, 5 Mart. (N. S.) 344. But they have no power to pledge the future earnings of the bank without authority from the stockholders. *Brown v. Bradford*, 103 Iowa, 378.

¹⁰ Even verbally. *Stamford Bank v. Benedict*, 15 Conn. 437.

¹¹ *First Nat. Bank v. Kimberlands*, 16 W. Va. 555; *Merrick v. Bank of Metropolis*, 8 Gill, 59; *Northampton Bank v. Pepoon*, 11 Mass. 288.

¹² *Wallace v. Exchange Bank*, 126 Ind. 265; *Waxahachie Bank v. Vickery*, 26 S. W. R. 876.

¹³ See § 109, *infra*, and *Am. Ex.*

Nat. Bank v. First Nat. Bank, 82 Fed. R. 961.

¹⁴ *First Nat. Bank v. Graham*, 79 Pa. 106, a case where cashier received special deposits; *Neiffer v. Bank of Knoxville*, 1 Head, 162, a case where president acted instead of cashier. See §§ 105, 109, *infra*.

¹⁵ *Prather v. Kean*, 29 Fed. R. 498; *Steffe v. Bank of Conneautville*, 22 Pitts. L. J. 157.

¹⁶ *Kelsey v. National Bank*, 69 Pa. 426.

¹⁷ *Merrick v. Bank of Metropolis*, 8 Gill, 59; *Dana v. Bank of U. S.*, 5 Watts & S. 223.

¹⁸ See 2 Cook on Corp., sec. 691.

gation of the bank;¹ to employ counsel,² and to appear for the bank.³ Why this is so is not apparent. If given the power to convey land he may make a deed in the name of the bank and affix the corporate seal.⁴ He has power to receive a deposit, but he has no power to bind the bank by admissions of a different contract than the one made when the deposit was received.⁵ If he has the authority to transfer the bank paper to a creditor as collateral, the power to indorse it will be presumed.⁶ His guaranty of the payment of a note by the bank's indorsement was in one case presumed to be authorized.⁷ But the cases are more numerous on a negative construction of his powers. If he transfers a judgment of the bank without collecting it the transfer is presumed to be unauthorized,⁸ since he has no power to sell the corporate property or exchange it.⁹ Nor has he authority to mortgage the real estate of the bank,¹⁰ nor the power to assign its property for the benefit of creditors,¹¹ unless authorized by the charter or by the board of directors.¹² He

¹ *Citizens' Bank v. Berry*, 53 Kan. 196; *Savings Bank v. Benton*, 2 Met. (Ky.) 240; *Merchants' Nat. Bank v. Eustis*, 8 Tex. Civ. App. 350. But not where the by-laws give this authority to the directors. *Citizens' Bank v. Keim*, 1 Wkly. Notes Cas. 263. He has been held to have power to offer a reward for the arrest of a defaulting teller. *Bank of Minneapolis v. Griffin*, 168 Ill. 314.

² See cases last cited.

³ See cases last cited.

⁴ *Burill v. Nahant Bank*, 2 Met. 163. But his lease of an elevator where no authority has been given to him by the board of directors is not binding on the bank. *Tulley v. Citizens' State Bank*, 18 Ind. App. 240.

⁵ *Hazleton v. Union Bank*, 32 Wis. 34.

⁶ *Irons v. Manufacturers' Nat. Bank*, 27 Fed. R. 591.

⁷ *City Nat. Bank v. Thomas*, 46 Neb. 861; *People's Bank v. National Bank*, 101 U. S. 181, as to vice-president.

⁸ *Cox v. Robinson*, 70 Fed. R. 760. He has no power to release a claim upon part payment. *State Sav. Co. v. Stewart*, 65 Ill. App. 391.

⁹ *Greenawalt v. Wilson*, 52 Kan. 109; *Asher v. Sutton*, 31 Kan. 286. The property in this latter case was the bank safe. The exceeding value attached to the safe may be the basis of the popular superstition that the only capital needed to start a bank in Kansas is a safe.

¹⁰ *Leggett v. New Jersey, etc. Co.*, Saxt. 541.

¹¹ *Gibson v. Goldthwaite*, 7 Ala. 281; *Hallowell Bank v. Hamlin*, 14 Mass. 180.

¹² See cases last cited.

has no power to compromise¹³ or release claims of the bank,¹⁴ unless the bank ratifies the act,¹⁵ or authorizes it by a course of dealing.¹⁶ He cannot waive a stipulation in the bank's contract for the sale of land.¹⁷ His *prima facie* authority does not extend to any acts which are usually within the scope of the cashier's powers, such as indorsing or transferring the bank's paper.¹⁸

§ 99. Vice-president.—The vice-president, as a general rule, acts simply in the place of the president. All the foregoing section is applicable to the vice-president when acting as president, and all the decisions which follow are applicable to the president as well. He has no *prima facie* power to borrow money for the bank,¹ nor to use the bank's assets as collateral to raise funds for the bank.² He has no authority to guarantee the payment of the bank paper except as a part of a transfer, where he has been authorized to make the transfer.³

§ 100. Cashier.—The cashier is the general executive officer of the bank. He is the general agent of the bank in dealing with its customers, and the general rule resulting from his situation is that his contractual acts bind the bank, unless they are contrary to law or to what stands for the bank's charter or to public policy.¹ He is not the agent of

¹³ Wheat v. Bank of Louisville, 5 S. W. R. 305. But for a peculiar case where the contrary was held, see Chem. Nat. Bank v. Kohner, 85 N. Y. 189. And see Case v. Hawkins, 53 Miss. 702; Farmers' Nat. Bank v. Templeton, 40 S. W. R. 412.

¹⁴ Olney v. Chadsey, 7 R. I. 224; Loomis v. Fay, 24 Vt. 240.

¹⁵ Winton v. Little, 94 Pa. 64.

¹⁶ Martin v. Webb, 110 U. S. 7, as to cashier.

¹⁷ Chadbourne v. Stockton Sav. Soc., 36 Pac. R. 127.

¹⁸ Smith v. Lawson, 18 W. Va. 212.

¹ Western Nat. Bank v. Arm-

strong, 152 U. S. 346, except by usage.

² Stewart v. Armstrong, 56 Fed. R. 167, though bank was held because it got the money, although its cashier wrongfully gave the money away.

³ People's Bank v. National Bank, 101 U. S. 181, also a case of estoppel.

¹ Squires v. First Nat. Bank, 59 Ill. App. 134; Wakefield Bank v. Truesdell, 55 Barb. 602. Under a statutory system in Louisiana see Union Bank v. Bagley, 10 Rob. (La.) 45; Clinton Co. v. Kernam, 10 Rob. (La.) 176; Ried v. Powell, 10 Rob.

he board of directors, but of the bank itself.² His general powers are not affected by statutes or charters which require the agreements or contracts of the bank to be executed in a certain way.³ In spite of such statutes he may sign and issue checks of his bank upon another bank.⁴ He has power to borrow money for the bank when the act is done in the usual course of business, but not otherwise,⁵ and he has power to certify checks upon the bank.⁶ He has power to transfer the bank's paper by indorsing it,⁷ and he has power to receive paper for collection and to do all acts proper in making the collection.⁸ It is one of the usual duties of the cashier to transfer stock on the books of the bank,⁹ and the bank is bound by his wrongful refusal to make a transfer,¹⁰ just as it is bound by his transfer even in a case where the bank lost its lien by the transfer and the cashier was a member of the firm to which the stock was transferred.¹¹ He may extend the time of payment upon the bank's paper,¹² and he may bind the bank by his statements made at the time of selling bills and notes sold by the bank.¹³ He has power to

2. 98; *Union Bank v. Jones*, 4 a. Ann. 220.

² *Bissell v. First Nat. Bank*, 69 Pa. 15.

³ See note 10 to § 96, *supra*.

⁴ See note 10 to § 96, *supra*.

⁵ *Barnes v. Ontario Bank*, 19 N. Y. 52, a certificate of deposit; *Donnell v. Lewis Co. Sav. Bank*, 80 Mo. 35. Compare *Ballston Spa Bank v. Marine Bank*, 16 Wis. 125; *Eastern Township Bank v. Vernon Nat. Bank*, 22 Fed. R. 186; *Ringling v. John*, 6 Mo. App. 333.

⁶ *Merchants' Bank v. State Bank*, 10 Wall. 604; *Farmers' Bank v. Merchants' Bank*, 16 N. Y. 125. *Contra*, *Mussey v. Eagle Bank*, 9 Met. 306.

⁷ *Bank of Genessee v. Patchen*, 19 N. Y. 312; *Wild v. Passaicquoddy Bank*, 3 Mason, 505, and many other cases. See *Barrick v.*

Austin, 21 Barb. 241. He has power to indorse paper in payment of bank's debts. *Fleckner v. United States Bank*, 8 Wheat. 338. But it is said he has no power to indorse to a third party except for collection. See *Elliot v. Abbott*, 12 N. H. 549; *State Bank v. Farmers' Bank*, 36 Barb. 332.

⁸ *Warren v. Gilman*, 17 Me. 360; *Brudenbecker v. Lowell*, 32 Barb. 9.

⁹ *National Bank v. Watsontown Bank*, 105 U. S. 217.

¹⁰ *Case v. Citizens' Bank*, 100 U. S. 446.

¹¹ *National Bank v. Watsontown Bank*, 105 U. S. 217.

¹² *Wakefield Bank v. Truesdell*, 55 Barb. 602.

¹³ *Sturges v. Bank of Circleville*, 11 Ohio St. 153; *Union Nat. Bank v. First Nat. Bank*, 45 Ohio St. 236.

employ special counsel to collect a claim for the bank.¹⁴ And if he receives checks signed in blank by a customer, who desires to go abroad and leaves the signed checks with the cashier to dispose of as she should direct, and if, after the customer has returned, he fraudulently fills up one of the checks and draws and appropriates the money obtained upon it from the bank, the bank cannot claim such money as against the customer.¹⁵ But a large number of acts have been held to be not within the scope of his general authority. He has no power to transfer judgments of the bank or to dispose of its property other than its paper;¹⁶ he cannot buy real estate for or sell the real estate of the bank,¹⁷ nor may he mortgage its real estate;¹⁸ but he may properly acknowledge an authorized deed of the bank.¹⁹ If authorized to borrow money out of the usual course of business he may do so, and the bank is liable even though he misappropriates the money.²⁰ But he cannot give the bank's note to the president to enable that officer to pay his own debt. Such an act does not release the maker of the note.²¹ He cannot make a contract in the bank's name for transferring money for the government;²² he cannot compromise or settle the claims of the bank,²³ or release its claims,²⁴ unless au-

¹⁴ *Root v. Olcott*, 42 Hun, 536, 115 N. Y. 635.

¹⁵ *Daniels v. Empire City Bank*, 92 Hun, 450. This seems a very close case. The decision might just as well have been that the customer constituted the cashier her agent to draw checks. Information which he received as her agent would, however, be imputable to the bank if he alone acted in cashing the check. The decision can be justified upon that ground and on no other. Compare with this case, *Alpena Nat. Bank v. Greenbaum*, 80 Mich. 1.

¹⁶ *Holt v. Bacon*, 25 Miss. 567; *Asher v. Sutton*, 31 Kan. 286. See *Bank v. Warren*, 7 Hill, 91.

¹⁷ *Winson v. Lafayette Co. Bank*, 18 Mo. App. 665.

¹⁸ *Leggett v. New Jersey, etc. Co.*, Saxt. 541.

¹⁹ *Sheehan v. Davis*, 17 Ohio St. 571.

²⁰ *Chemical Nat. Bank v. Armstrong*, 56 Fed. R. 392, 16 U. S. App. 465.

²¹ *Rhodes v. Webb*, 24 Minn. 292.

²² *United States v. City Bank*, 21 How. 356. Nor can he bind the bank by agreeing to pay usurious interest. *Hanson v. Heard*, 38 Atl. R. 788.

²³ *Bank of Commerce v. Hart*, 37 Neb. 197.

²⁴ *Thompson v. McKee*, 5 Dak. 172; *Ecker v. First Nat. Bank*, 59 Md.

thorized so to do by the rules and usages of the business,²⁵ or in payment of the bank's claim, when he may do all acts required to complete the payment;²⁶ he has no power to make purchases for the bank not in the line of acquiring bankable securities;²⁷ he has no power to assign the bank's property unless it be in the usual course of business.²⁸ It was held in one case that he had no power to pledge the assets of the bank to secure an antecedent debt,²⁹ and in another that he had no power to make acceptances at all;³⁰ certainly he has no power to make accommodation acceptances,³¹ except of course to a *bona fide* holder; he has no general power to receive special deposit of papers.³² It was held in one case that he had no power to make an answer to a garnishment.³³ He cannot bind the bank by signing its name to an indemnity bond given upon an execution in the bank's favor;³⁴ nor has he power to bind his bank to defend a suit for a correspondent, where the correspondent is sued for negligence in collecting.³⁵ But this *prima facie* power or lack of power is capable of variation by the course of dealing in a bank, as we shall hereafter see.³⁶

291; Coheco Nat. Bank v. Harkel, 51 N. H. 116; Hodge v. First Nat. Bank, 22 Grat. 51.

²⁵ Ryan v. Dunlap, 17 Ill. 40.

²⁶ Matthews v. Massachusetts Nat. Bank, Fed. Cas. No. 9286.

²⁷ Lionberger v. Maxer, 12 Mo. App. 575; North Star Co. v. Stebbins, 2 S. Dak. 74. *Contra*, Crystal Plate Glass Co. v. First Nat. Bank, 6 Mont. 303, *semble*. The purchase was for a third party, and hence the case is wrong because the cashier had no such power.

²⁸ Hartford Bank v. Barry, 17 Mass. 94. See Lamb v. Cecil, 25 W. Va. 288.

²⁹ State of Tennessee v. Davis, 50 How. Pr. 447.

³⁰ Pendleton v. Bank of Kentucky, 1 T. B. Mon. 171, under a statute.

³¹ Farmers' Bank v. Troy Bank, 1 Doug. 457.

³² Lloyd v. West Branch Bank, 15 Pa. 172.

³³ Branch Bank v. Poe, 1 Ala. 396. But his affidavit for a *capias* is proper on behalf of the bank. Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 426.

³⁴ Watson v. Bennett, 12 Barb. 196.

³⁵ First Nat. Bank v. Manufacturers' Nat. Bank, 10 Ohio Cir. Ct. R. 283. But if the cashier had made the agreement as part of the consideration for receiving the draft for collection, there seems to be no reason why such an act should not be within the scope of his general authority, provided the engagement were otherwise enforceable.

³⁶ See § 105, *infra*.

§ 101. Treasurer of savings bank and other general agents.—The treasurer of a savings association is an officer with general powers analogous to the cashier's powers in a bank. A suit instituted on behalf of the savings association by its treasurer is presumed to be authorized.¹ He may authorize the attorney of the corporation to levy execution upon land and to purchase the same for the bank, and in pursuance thereof to bring a writ of entry.² A manager of a branch bank has power to bind the bank as an accommodation indorser upon a draft payable at a branch bank.³ In fact the manager of a branch bank must necessarily represent for that branch all the corporate power. It would be difficult to find a corporate officer with as much authority, for as to the branch he must to the general public be a board of directors, a president and a cashier.⁴ An agent with a general authority binds the bank by his transfer as a matter of course.⁵ An authority given to an agent carries with it the powers necessary or fairly adapted to carrying out the authority.⁶ But a clerk acting as cashier in place of an absent cashier has authority to indorse the bank's paper only for collection.⁷

§ 102. Tellers and book-keepers.—In banks where one teller acts at both the receiving and the paying counter, there can be no discrimination between the paying and the receiving teller, but in many banks the two functions are in separate officers, and in some banks these officers each have

¹ Bangor Sav. Bank v. Wallace, 87 Me. 28. See also § 232, *post*.

² Bristol Co. Sav. Bank v. Keavy, 128 Mass. 298.

³ Canadian Bank v. Coumbe, 47 Mich. 358.

⁴ Such officers are the managers, for instance, of Wells, Fargo & Co., at Salt Lake City, or New York or London.

⁵ Smith v. Lawson, 18 W. Va. 212.

⁶ Burrill v. Nahant Bank, 2 Met. 163.

⁷ Potter v. Merchants' Bank, 28 N. Y. 641. This is one of the decisions resulting from the mistaken New York doctrine that a deposit for credit passes complete title to the bank. This ruling can be correct only as to one who knew a clerk was temporarily acting. A person who comes into a bank and finds a man acting as cashier has the right to assume he has the powers of cashier.

assistants. But the public are not supposed to know the functions of those various officers in the bank.¹ It is the business of the receiving teller to receive all the deposits at the bank, in subordination, of course, to the cashier. Therefore the bank is liable for the teller's receipt of packages for safe-keeping, where no order has been given to the contrary.² He is also charged with the duty of receiving notes and drafts for collection, as a general rule; and it has been held that the bank was responsible for a note left with the paying teller for collection, although it was indorsed by a general indorsement;³ and the bank is also liable for a collection left with the assistant receiving teller who was temporarily acting.⁴ The paying teller is the proper officer to make payments over the counter for checks drawn upon the bank. He is the proper officer to whom to apply as to the genuineness of a certificate upon a check; but if he fails to state that a check has been stopped to one who merely inquires as to the genuineness of the signature, the bank is not bound by his failure.⁵ The note teller of the bank cannot erase a name of a maker on a note so as to bind the bank.⁶ It would seem to follow as a general principle that an act of alteration made by any officer of a bank, who had not the power to make the alteration, would be an act of spoliation by a stranger. A paying teller, or any other officer of a bank, cannot bind his bank by an act unlawful and unauthorized, unless the act be a tort.⁷ A paying teller has no authority to certify a check where the drawer of the check has not sufficient funds to meet it, although he has general authority to certify

¹ See the next case.

² *Pattison v. Syracuse Bank*, 1 Hun, 606. Compare, however, *Lloyd v. West Branch Bank*, 15 Pa. 172.

³ *City Nat. Bank v. Mastin*, 70 Tex. 643.

⁴ *Hotchkiss v. Artisans' Bank*, 2 Keyes, 564.

⁵ *Clews v. New York Banking Ass'n*, 89 N. Y. 418, reversing 8

Daly, 476. The lower court made the correct decision. The bank was afterward held liable on the ground of negligence. See *Clews v. Bank*, 105 N. Y. 398, 114 N. Y. 70. The court reversed itself, but would not admit it.

⁶ *Marine Bank v. Terry*, 40 Ill. 255.

⁷ *Clark v. Metropolitan Bank*, 3 Duer, 241.

checks;⁸ and it seems that the paying teller binds the bank, where a check is left with him for collection upon a depositor, where the paying teller agreed that he would cause the check to be paid during the day if the depositor should have sufficient funds during the day in the bank.⁹ But the paying teller has no authority to receive deposits, and where he takes a deposit, but embezzles it, the bank is not liable;¹⁰ nor is the bank liable where the book-keeper takes a deposit, and enters it upon the customer's pass-book and in the ledger, but in no other place.¹¹

§ 103. Place of acting.—Every bank has a well-known place of business, and, as a general rule, any act done by an agent, unless specially authorized or ratified by the bank, away from the place of business, ought not to be binding upon the bank.¹ But there are exceptional cases, such as that of a cashier going to another bank to buy gold,² or going to another place to settle business of the bank. The bank

⁸Clarke Nat. Bank v. Albion Bank, 52 Barb. 592. It would have been good if the holder was a *bona fide* holder. Farmers' Bank v. Butchers' Bank, 16 N. Y. 125. But the form of the check was notice in the former case.

⁹Washington Nat. Bank v. Averell, 2 App. D. C. 470.

¹⁰Thatcher v. State Bank, 5 Sandf. 121. This case cannot be justified on principle. See the next note. Compare City Nat. Bank v. Mastin, 70 Tex. 643. This latter case states the sound reason why the bank should be held.

¹¹Manhattan Co. v. Lydig, 4 Johns. 377. Although Chancellor Kent was one of the concurring judges, this case as well as the latter seems open to objection. Of course it may be said a man dealing with a bank is bound to know the powers of its dif-

ferent officers; but suppose an ignorant man knowing nothing of banks should come into a bank with a check or draft to collect and should go up to a window and hand his check or draft to the wrong clerk, who should tell him to indorse it to himself, the bank would be liable for the clerk's action. See note 3, *supra*. But if it were money or something else for deposit these cases say the bank would not be liable. It is right that the bank should be liable, because it impliedly represents its employees to be something better than mere confidence men. See the last note.

¹Sandy River Bank v. Merchants' Bank, 1 Biss. 146. The general rule is stated in Merchants' Bank v. Rudolf, 5 Neb. 527.

²Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. 604.

has been held for an indorsement³ or an admission made by the cashier upon the street,⁴ and other cases exceptional in their nature are likely to happen,⁵ such as torts.

§ 104. **Surrendering the bank's rights.**— There are certain cases which use language to the effect that the officers of the bank have not the right to surrender the rights of the bank on a note by statements made at the making of it. But this statement is inaccurate. In a leading case where the language is used, the judge deciding the case did not understand the point he was deciding.¹ The case was one where the officers of a bank represented to an indorser or agreed with the indorser that the indorser would not be liable. The real point was that the party was seeking to contradict the effect of the written document by parol evidence. But other courts have followed this deliverance,² and it is possible that courts may go on repeating it. The rule as to parol evidence to vary a written contract is that it is not admissible except in cases of fraud or mistake. But a representation by a bank officer that a person indorsing a note would not be liable on it is, of course, not a fraudulent representation, or a representation of a fact at all, or a representation upon which the indorser had a right to rely. Yet if at the time the indorse-

³ Bissell v. First Nat. Bank, 69 Pa. 415.

⁴ Kingston v. First Nat. Bank, 26 Wis. 663.

⁵ Pendleton v. Bank of Kentucky, 1 T. B. Mon. 171.

¹ Bank of U. S. v. Dunn, 6 Pet. 51, by Justice McLean. He did not repeat this statement in Bank of Metropolis v. Jones, 8 Pet. 12.

² Loomis v. Fay, 24 Vt. 240. This case advances the theory that such an agreement would be a fraud on the bank. That is no reason for not holding the bank liable. It is liable for many acts of its agents that are a fraud upon it. Other cases put forward the theory that the

other party had no right to rely upon such an agreement. That is true. But the theory of the law is that the note cannot be varied by such evidence. Other cases say that the act was beyond the scope of the officer's duty, but that is simply *petitio principii*. Suppose a benefit was granted to the bank for such an agreement. The other cases which follow Bank of U. S. v. Dunn are Whitehall Bank v. Tisdale, 18 Hun, 151; Mapes v. Second Nat. Bank, 80 Pa. 163; and see Comp. v. Carlisle Bank, 94 Pa. 409, which was clearly a case under parol evidence rule.

ment is given an actual fraudulent representation is made by an officer of the bank who has the power to act in regard to the note, the bank will be responsible for the fraudulent representation.³ This is the general rule now fully established, that a corporate officer perpetrating a tort in the performance of the business of the corporation which he is qualified to perform renders the corporation liable.⁴

§ 105. Special course of dealing.—Although the apparent scope of the authority of bank officers is as stated in the preceding section, that apparent authority may be greater owing to the fact that the governing authority in the corporation has permitted to the particular officer an apparent authority greater than he would otherwise enjoy. The corporation is bound by the action of its governing body. That governing body permits an agent to assume greater power than he is entitled to enjoy. From such conduct an agency by estoppel arises.¹ On principle it makes no difference whether the agent's acts are authorized by the special charter or articles of agreement, or are contrary thereto; the corporation is bound as to third parties, just as the principal would be bound who defined his agent's authority in a written document and then knowingly permitted him to ex-

³ First Nat. Bank v. Pegram, 118 N. C. 671. This case must decide that the cashier had power to make the representation, for it is not conceivable that the court would knowingly permit a wrong judgment to stand. Grant v. Cropsey, 8 Neb. 205. This last case is questionable as an authority. If the bank receives a benefit, the bank will be bound even though the officer's act was a fraud. But the making of the contract is, as a matter of consideration, the reception of a benefit by the bank. See Manhattan Life Ins. Co. v. Farmers' Bank, 10 Blatch. 344.

⁴ See, for the principle, Pahqui-

oque Bank v. First Nat. Bank, 36 Conn. 325. See the preface to Cook on Corporations. It is not necessary here to recapitulate the authorities upon this question. Of course, to make the corporation responsible for punitive damages, the corporation must have authorized or ratified the tort. Lake Shore Ry. Co. v. Prentice, 147 U. S. 101. But other authorities are *contra*. See note 11 to § 96, *supra*.

¹ This form of agency is a matter of common application in the law of principal and agent. See Bronson's Executor v. Chappell, 12 Wall. 681; Johnson v. Hurley, 115 Mo. 513.

ercise a greater authority.² A corporation, by a course of dealing, can commit the whole corporate authority to one particular officer. The limitation is that the officer be not forbidden, by an express general statute or rule of law, from exercising the particular authority.³ So it is held that the directors of a bank, by allowing its cashier to exercise the whole corporate authority, make the bank responsible for the acts of the cashier beyond the scope of his usual authority in other banks.⁴ But in order to bind the bank, where an officer acts outside the usual scope of his authority, the bank must be a party to the circumstances, or chargeable in some way with knowledge.⁵ Since such action is by the implied authority of the board of directors, it follows that the bank is bound, where it receives a benefit, whether the act is contrary or not to the special charter or to the articles of agreement.⁶ The same result ought to follow as to any

²See note 9 to § 120, *post*, and note 3 following this note. By the rule laid down in § 33, *ante*, the bank receiving a benefit would be held to be bound, except where the transaction was forbidden by a positive rule of law or a statute, and was not purely *ultra vires*. That is the doctrine of the Supreme Court of the United States, and yet it is not.

³If he is, no estoppel arises. *Burrows v. Niblack*, 84 Fed. R. 111, *semble*; and *Kennedy v. California Bank*, 167 U. S. 362, applies the principle to a purchase merely beyond the corporate power. But the latter case is wrong on that point. See § 33, *ante*, and s. c., 101 Cal. 495.

⁴*Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82; *Davenport v. Stone*, 104 Mich. 521, rediscounting by cashier; *City Nat. Bank v. National Park Bank*, 32 Hun, 105, borrowing money by president and fraudulent representations binding on the

bank, because the president was permitted to absorb all the corporate power. See also *Cox v. Robinson*, 82 Fed. R. 277; *Armstrong v. Cache Valley Co.*, 48 Pac. R. 690; *National Bank v. First Nat. Bank*, 79 Fed. R. 961; *Carpey v. Dowell*, 115 Cal. 677.

⁵*Wheat v. Bank of Louisville*, 5 S. W. R. 305. Compare *Robinson v. Bealle*, 20 Ga. 575. But if the facts are on the books of the bank, knowledge of the directors is presumed. *Bank of Carlisle v. Fleming*, 44 S. W. R. 961.

⁶*Hagerstown Bank v. Loudon Sav. Soc.*, 3 Grant Cas. 135. This idea seems to contradict the proposition that every man dealing with a corporation is bound to know the authority of its agents as defined in the articles of agreement or charter. But the two things may be reconciled by the consideration that the representation has prevented the ascertainment of the

particular course of action with reference to special matters permitted by the corporate direction.⁷ The bank is likewise bound. These cases may be also treated as cases of acquiescence by the bank.

§ 106. Officer agent for another.—When the officer of a bank in a particular transaction acts as agent or trustee for another, and also as agent for the bank, the question involved is more frequently one of notice than of power in the agent; but it may serve a useful purpose to collect some of the cases in one section in order to illustrate the general principle. Some of the cases are decided on the question of which party has received a benefit. Thus, where the treasurer of one company was the cashier and manager of a bank, and took the bonds of the company and pledged them in the name of the bank, and secured advances to be made to the bank, the directors of the bank as well as the directors of the corporation being ignorant of the whole matter, the bank was held liable for the bonds, on the plain ground that it had received a benefit.¹ Again, a cashier was the agent of a trustee. He received trust moneys into the bank, and knowingly allowed the trust money to be taken to pay the private debt of the trustee,² and his bank was held liable. This is a simple case of notice to the bank, where the agent had acquired his knowledge while acting upon the bank's business, and his knowledge was therefore imputable to the bank. In another case a town treasurer was the cashier of a bank. He drew a note as town treasurer and discounted

fact. See note 2, *supra*. The distinction should be that the act be not forbidden by a statute or rule of general law.

⁷ *Caldwell v. National Mohawk Val. Bank*, 64 Barb. 333; *Martin v. Webb*, 110 U. S. 7; *Mercantile Bank v. McCarthy*, 7 Mo. App. 318; *First Nat. Bank v. Graham*, 79 Pa. 106; *Neiffer v. Bank of Knoxville*, 1 Head, 162, as to president signing

checks and receiving payments instead of cashier. *Iowa State Bank v. Black*, 91 Iowa, 490, is not *contra*, because there was no course of dealings. See also *First Nat. Bank v. Stone*, 106 Mich. 367; *Winton v. Little*, 94 Pa. 64.

¹ *Fishkill Sav. Inst. v. Bostwick*, 80 N. Y. 162.

² *Loring v. Brodie*, 134 Mass. 453.

at his bank and pocketed the proceeds; the board of directors of his bank was ignorant of the transaction, he alone acting.³ This is a case of notice, and it was rightly held that the bank could not sue on the note, the reason being that, the cashier having acted for the bank in discounting the note, whatever he knew the bank must be held to know. It will be seen from the preceding cases that where two corporations have common officers, and are dealing with each other, the question that arises is sometimes a question of power in the officer and sometimes a question of notice to the bank through an officer. If it is a question of power in the agent, two conditions of fact may arise. The two corporations may have a common officer, but the common officer does not act for either corporation. In such case the act of the common officer existing is wholly immaterial.⁴ Or, again, the common officer may act for the one corporation and other officers may act for the other corporation. In such case the fact of the common officer existing is wholly immaterial as to the corporation for which the common officer does not act. But where the same officer acts for both corporations, the rule to be applied is that the agent may contract with himself as agent to the extent of his power; that is to say, the binding force of the contract upon each corporation is to be determined solely by the question of the agent's power given him by that particular corporation.⁵ If any question of notice arises the rule is very simple. All the knowledge, though uncommunicated, that its agent had present in his mind at the time of the transaction is to be imputed to each corporation. Thus, calling the bank B. and the other corporation A., all that the officer knew,

³ First Nat. Bank v. New Milford, 3 Conn. 93. The opinion puts the case on the ground that by suing on the note it ratified the fraud. But that ground seems hardly sound. Suppose the bank had sued for money had and received, not ratifying the fraud, under the opin-

ion it could have recovered. But it could not because it had notice.

⁴ First Nat. Bank v. Christopher, 40 N. J. Law, 435.

⁵ Thus Fort Dearborn Nat. Bank v. Seymour, 73 N. W. R. 724, is a question of power.

whether he gained his knowledge on the affairs of the bank or the other corporation B., if the latter was present in his mind, is to be imputed to the bank A., and all that he knew as agent of the other corporation B., or as agent of the bank A., if it was present in his mind, is to be imputed to B.⁶ Thus, the cashier of a bank makes a contract with the directors of a corporation, of which he is also a director, but in regard to which he acted solely for the bank; his power is to be determined by the general scope of his authority, the particular course of dealing as to the allowance of power to the cashier in that bank in connection with the considerations of express or implied authorization or of ratification or of retention of benefits by the bank. But if the cashier of the bank makes a contract with a corporation of which he is an officer, and he acts on both sides, his power to make the contract is still to be determined by the rules of law stated as to the last illustration, with the limitation that if he knows that as officer of the bank he has not the power to make the contract, although it would generally be lawful for him to make it, his knowledge is to be imputed to the other corporation, if present in his mind, and that corporation's rights are to be treated as if he knew the cashier's lack of power; and conversely, if he knew that he, as officer of the other corporation, or the other officers with whom he was acting for the other corporation, had not the power to make the contract, his knowledge is to be imputed to the bank if present in his mind, and the bank is to be treated as if it knew that he, as the officer of the other corporation, had not the power to make the contract. The cases applicable to banks it is believed bear out this statement of the law. Thus, it is held that if the bank officer dealing as officer for another corporation with the bank does not communicate his knowledge to the bank, the bank is not bound, *where the bank officer did not act in the particular transaction for the bank.*⁷ But if in such a dealing of

⁶ Murray v. Pauly, 56 Fed. R. 962, Mass. 74; Innerarity v. Merchants' Nat. Bank, 139 Mass. 332; First

⁷ Corcoran v. Snow Cattle Co., 151 Nat. Bank v. Loyhed, 28 Minn. 396;

he bank with another corporation, the bank officer acting or the other corporation *also acted for the bank*, the bank is hargeable with whatever knowledge the bank officer had.⁸ But the limitation by some of the cases is made that the common officer must alone act for both corporations.⁹ This limitation is not logical for this reason: If the officer is acting as one of a board of directors or one of a committee, the knowledge of one member of the committee is the knowledge of all of them; and so one case plainly recognizes,¹⁰ where the point was drawn to its attention, while it was not carefully or at all examined in the other cases, in both of which the assertion is the purest *dictum*.¹¹ But it should appear that the knowledge was present in the mind of the agent when he acted, unless the court of the particular jurisdiction recognizes a presumption of communication.

§ 107. Officer acting about his private affairs.—An officer of a bank has no right to use the bank or its funds for his private advantage, and, as we shall see in the next section, any person who has knowledge of such a fact can claim nothing against the bank from such a transaction. But without reference to the question as to who is claiming the benefit of the transaction, but simply considering the matter as a question of power in the officer as the bank agent, the rule above stated is uniform. Thus, the president of a bank

Henton v. German-American Bank, 22 Mo. 332; *Oak Grove Cattle Co. v. Foster*, 41 Pac. R. 522; *Bank v. Blake*, 60 Fed. R. 78. *Owensboro v. Daviess Co. Court*, 12 S. W. R. 930, 3 S. W. R. 101, seems to be *contra*, but is too vague to afford much light. See also *Wilson v. Bank*, 7 Atl. R. 145.

⁸ *Le Duc v. Moore*, 111 N. C. 516.

⁹ *Corcoran v. Snow Cattle Co.*, 151 Mass. 74; *Bank v. Blake*, 60 Fed. R. 8. Wherever there is any presumption from the fact that others are acting for the bank and that

the particular officer is not, this rule is very proper.

¹⁰ *Le Duc v. Moore*, 111 N. C. 516, overruling on this very point, *Commercial Bank v. Burgwyn*, 110 N. C. 267.

¹¹ See statement of facts in both cases, cited in note 9, *supra*. In accordance with the rules in this section, *Niblack v. Cosler*, 80 Fed. R. 596; *Broston v. Penniman*, 97 Ga. 527; *Detroit Motor Co. v. Third Nat. Bank*, 69 N. W. R. 726; *Withers v. Lafayette Co. Bank*, 67 Mo. App. 115, and *Leonard v. Lattimer*, 67 Mo. App. 138, are correct.

cannot appropriate the bank's note to pay his own debt,¹ nor can the cashier² or the president bind by contract the bank in a transaction where the bank is not interested;³ but of course the bank may ratify such a transaction,⁴ or permit it by the conduct of its governing body,⁵ which is ratification in advance, if the phrase be permissible. An agent authorized to certify checks cannot bind the bank by certifying his own check or indorsing his own note,⁶ or by issuing certificates of deposit to himself,⁷ or by certifying checks when the drawer has no funds,⁸ or by paying checks of a creditor of the president when the creditor has no funds in the bank,⁹ nor by paying his own debts with the bank's funds without authority,¹⁰ nor by a promise to pay a check if sent through the clearing-house regardless of the presence in the bank of funds to meet the check,¹¹ nor by drawing drafts to use in his private business,¹² nor by drawing drafts to cover his own embezzlement,¹³ nor by entering into a conspiracy to swindle creditors.¹⁴ In all such cases if the bank is to be held it must be on grounds of ratification, or of a course of dealing permitting the acts, or of estoppel by the retention of benefits received by the acts, or because the party claiming under the contract is recognized by the law to be in

¹ Rhodes v. Webb, 24 Minn. 292.

² State Nat. Bank v. Newton Nat. Bank, 66 Fed. R. 691, 32 U. S. App. 52.

³ Kennedy v. Otoe Co. Nat. Bank, 7 Neb. 59.

⁴ Winton v. Little, 94 Pa. 64.

⁵ Martin v. Webb, 110 U. S. 7.

⁶ Claffin v. Farmers' Bank, 2 Am. Law Reg. (N. S.) 92; West St. Louis Sav. Bank v. Shawnee Co. Bank, 95 U. S. 557.

⁷ Lee v. Smith, 80 Mo. 304.

⁸ Clarke Nat. Bank v. Albion Bank, 52 Barb. 592; Pope v. Bank of Albion, 57 N. Y. 126.

⁹ Dowd v. Stephenson, 105 N. C. 467.

¹⁰ Christie v. Foster, 61 Fed. R. 551.

¹¹ Morse v. Mass. Nat. Bank, Fed. Cas. No. 9857. It would not bind the bank if authorized, unless in writing, because if there were no funds it would be within the statute of frauds.

¹² Anderson v. Kissam, 35 Fed. R. 699; Lamson v. Beard, 94 Fed. R. 30; United States v. Johnson, Fed. Cas. No. 15,483; Ruohs v. Third Nat. Bank, 94 Tenn. 57.

¹³ Faneuil Hall Bank v. Bank of Brighton, 16 Gray, 534. The bank would be held to a *bona fide* holder.

¹⁴ Johnston-Fife Hat Co. v. Nat. Bank of Guthrie, 4 Okl. 17.

ood faith, through lack of notice and the payment of value, r the suffering of a detriment on the faith of the act.¹⁵

§ 108. Bona fide third parties.—In the case of commercial paper or other property of the bank, whenever it comes into the hands of a third party who had no notice of the corporate officer's lack of authority, and who is a holder for value, the bank is bound by the transaction.¹ But whenever the paper on its face shows that in the transaction there must have been a want of authority, such fact gives full notice to every one who deals with the paper,² such as drafts of a bank in favor of the president of the bank and signed by himself as president, erasing the word "cashier,"³ or post-dated checks certified before they could be cashed.⁴ And it is stated that those having notice of the officer's want of authority, where there is a want of authority, by knowing the circumstances of the act cannot claim as against the bank,⁵ if the validity of the act depends solely upon the question of power and not of ratification or authorization.

¹⁵ See the succeeding section.

¹ Faneuil Bank v. Bank of Brighton, 16 Gray, 534; Phillips v. Mercantile Bank, 140 N. Y. 556; Goshen Nat. Bank v. State, 141 N. Y. 379; Blair v. First Nat. Bank, 2 Flip. 11; Houghton v. First Nat. Bank, 3 Wis. 663; Central Trust Co. v. Cook Co. Nat. Bank, 15 Fed. R. 885; Farmers' Bank v. Butchers' Bank, 3 N. Y. 125. See Dime Sav. Inst. v. Allentown Bank, 65 Pa. 116.

² Anderson v. Kissam, 35 Fed. R. 39; Clarke Nat. Bank v. Albion Nat. Bank, 52 Barb. 592; Pope v. Bank of Albion, 57 N. Y. 126. The identity of name is notice. Claflin v. Farmers' Bank, 2 Am. Law Reg. (N. S.) 92; Lee v. Smith, 84 Mo. 304. *Contra*, Central Trust Co. v. Cook Co. Nat. Bank, 15 Fed. R. 885. But in this latter case it might be said

that some officer had power to indorse. The case is hardly sound. See West St. Louis Bank v. Shawnee Co. Bank, 95 U. S. 557. One court puts forward the queer idea that such an indorsement is merely voidable. Preston v. Cutter, 64 N. H. 461. It is void.

³ Lamson v. Beard, 94 Fed. R. 30.

⁴ Clarke Nat. Bank v. Albion Bank, 52 Barb. 592.

⁵ Bank of E. Tenn. v. Hook, 1 Cold. 156. One case, Williams v. Dorrier, 135 Pa. 445, is decided on the basis of *uti possidetis*. It is partly right and partly wrong. Breyfogle v. Walsh, 71 Fed. R. 898, is rightly decided by reason of the fact that the parties knew the lack of authority. The reasons given by the court for its judgment are absurd.

§ 109. **Ratification.**—The bank may ratify an act which it could have authorized, and even those acts, which are *ultra vires* in the sense of being merely beyond the corporate power,¹ it may ratify. This ratification may be express, or may be implied from long acquiescence or delay in objecting, or by the retention of a benefit received under the unauthorized contract, or by insisting upon it as valid. This species of ratification is in the nature of an estoppel. Cases where the act is held authorized by a course of dealing might be called a species of ratification.² But leaving out these latter cases, and considering the other instances mentioned, it is plain that in the case of an express ratification the proof can never be difficult. The action of the board of directors or of any other officers competent to act determines the fact. In cases of implied ratification the existence of the fact is to be deduced from circumstances. A long delay or failure to object to an unauthorized act will estop the corporation, especially where the other party has altered his situation with reference to the matter.³ The reception of a benefit by the corporation will estop the corporation from objecting.⁴ Thus if the corporation retains the consideration received for a deed, it cannot object that the officer was unauthorized to make the deed.⁵ Even if the officer deceived

¹ See § 33, *ante*, for many cases of this nature.

² See § 105, *ante*.

³ *Peninsular Bank v. Hanmer*, 14 Mich. 208; *Bank of Pa. v. Reed*, 1 Watts & S. 101; *Parker v. Donnelly*, 4 W. Va. 648; *Kelsey v. Nat. Bank of Crawford Co.*, 69 Pa. 426. One case says want of objection alone not sufficient. *Tift v. Quaker City Bank*, 8 Pa. Co. Ct. R. 606. But that is not an accurate statement.

⁴ *Peninsular Bank v. Hanmer*, 14 Mich. 208; *Tradesmen's Nat. Bank v. Bank of Commerce*, 39 N. Y. Supp. 554; *Goldbeck v. Kensington Nat. Bank*, 147 Pa. 267; *Merchants' Nat.*

Bank v. McNulty, 31 S. W. R. 1091; *Bank of New London v. Ketcham*, 64 Wis. 7; *Johnston-Fife Hat Co. v. National Bank*, 4 Okl. 17, where the bank received the benefit of a swindling conspiracy; *Manhattan Life Ins. Co. v. Farmers' Bank*, 10 Blatch. 344; *Hughes v. First Nat. Bank*, 110 Pa. 428; *Owens v. Stapp*, 32 Ill. App. 653; *Johnston v. Southwestern Bank*, 3 Strob. Eq. 263; *Cutting v. Marlor*, 78 N. Y. 454; *Hawkins v. Fourth Nat. Bank*, 49 N. E. R. 957.

⁵ *Akers v. Ray Co. Bank*, 63 Mo. App. 316.

the bank, and the bank retains the benefit of his act, it is liable for the act as authorized.⁶ For although ratification must be with knowledge,⁷ yet where it retains a benefit it will not be heard to say it had not knowledge. Where a bank receives and keeps the sum or consideration paid for extension of payment on its claim, it ratifies the extension though unauthorized.⁸ So where the bank retains the money derived from the unauthorized pledge of another corporation's securities, it must answer to that corporation for the securities.⁹ On the same principle, if the corporation attempts to enforce an unauthorized contract, it binds itself to the contract.¹⁰ It cannot approbate and reprobate in the same breath. If the bank protests a draft received for collection, it ratifies the receipt for collection.¹¹ It was held in the case of a town treasurer, who was also cashier of a bank, and who drew a note as town treasurer and signed it as such, but discounted it to his bank for his own individual profit, that the bank by bringing suit on the note ratified the cashier's fraud.¹² Whenever a ratification is shown in this manner it amounts to a prior authority.¹³ There are other cases which may be called cases of ratification. Thus a cashier pledged bonds of the customer deposited for safe keeping with the bank. The pledge was for the benefit of the bank and the pledgee acted in good faith. The cashier afterwards got the bonds back by a fraud, and it was held that the bank could not object to the pledgee's title while

Kennedy v. First Nat. Bank, 101 U. S. 413; 12 Fed. Cas. No. 7701a.

Western Nat. Bank v. Armstrong, 152 U. S. 346.

Perkins v. Bank of La., 5 La. Ann. 222.

Fishkill Sav. Inst. v. Bostwick, N. Y. 162. It cannot deny an officer's authority to make a loan for which it receives the money upon a loan. Blanchard v. Commercial Bank, 75 Fed. R. 249.

Wilson v. Pauly, 72 Fed. R. 129, 130; U. S. App. 642; Planters' Bank

v. Sharp, 4 Smedes & M. 75; Le Grande Nat. Bank v. Blum, 27 Oreg. 215.

¹¹ Averell v. Second Nat. Bank, 6 Mackey, 358.

¹² First Nat. Bank v. Milford, 36 Conn. 93. This case is put on the wrong ground. The cashier alone acted for both parties. The bank had notice of the lack of authority of town treasurer. See note 3, § 106, *ante*.

¹³ See preceding note.

it retained the bonds and ratified the cashier's fraud.¹⁴ Two cases that are at first glance irreconcilable decide the effect of a cashier's act in receiving money into the bank and then wrongfully passing it out. Thus the president of a bank discounted his notes to another bank, claiming that his bank would not pay the notes. The money was deposited with his bank to the president's credit. It was held that the bank was not liable for the loan, as there was no evidence that it retained the proceeds. It was simply the medium of transference.¹⁵ In the other case the vice-president made a loan in the bank's name and the money was put to the bank's credit and the cashier notified. The vice-president thereupon caused the cashier to put the money to his (the vice-president's) credit, and he used the money for private purposes. It was held that the bank having received the money was liable.¹⁶ A yet different case was caused by the astute operation of a couple of tellers and a broker. The paying teller of the first bank was short in his accounts. A complaisant broker drew a check on the first bank. The paying teller marked it good. Then the broker took the check to the teller of a second bank, who cashed it. The broker took the money to the paying teller of the first bank, who deposited it amongst his cash. It was held that the second bank could recover the money from the first bank. The first bank by retaining the money ratified the fraud.¹⁷

§ 110. Admissions of bank officers.—The general rule is that the admission of an agent while he is acting within the scope of his authority and in regard to a matter then depending, or, as it is expressed, *dum fervet opus*, is binding upon his principal.¹ An admission that is merely a state-

¹⁴ Ringling v. Kohn, 4 Mo. App. 59.

¹⁵ First Nat. Bank v. Hanover Nat. Bank, 66 Fed. R. 34, 13 C. C. A. 313. Compare Western Nat. Bank v. Armstrong, 152 U. S. 346.

¹⁶ Stewart v. Armstrong, 56 Fed. R. 167.

¹⁷ Atlantic Bank v. Merchants'

Bank, 10 Gray, 532. *Accord*, Skinner v. Merchants' Bank, 4 Allen, 290. *Contra*, Bank of Charleston v. State Bank, 13 Rich. Law, 291, an indefensible ruling.

¹ Another statement of the rule which amounts to the same thing is that the admission must be a

ment or narration of a past occurrence is not admissible, because the agent is not authorized to make admissions of that character.² But if the agent has authority to act about a particular matter, his statements made while acting as agent in regard to the matter are binding upon the bank, whether the statements are an admission as to a past or a present occurrence.³ It must be shown that the declaration was in regard to a matter within the legal sphere of action of the corporate agent.⁴ It is upon this ground, perhaps, that it has been held that the admission of the genuineness of an endorsement by the bank teller is not binding upon the bank;⁵ and the admission by a single director not authorized to act for the bank has been held not to be binding upon the bank.⁶ In one case of doubtful authority it has been held that a bank cashier who rented premises for the bank did not bind the bank by admissions as to the purpose of the bank in renting the premises, or as to the terms of a previous renting.⁷ It would seem, too, that the statement sought to be considered an admission must have been made to the party relying upon it, or to some one for him;⁸ but this statement is not entirely free from doubt.⁹ Stockholders are not authorized merely in their capacity as stock-

part of the *res gestæ*. Railroad Co. v. O'Brien, 119 U. S. 99; Idaho Forwarding Co. v. Insurance Co., 8 Utah, 41. Courts sometimes stretch the rule as to what is a part of the *res gestæ* to an unwarranted length. See Huffcutt on Agency, secs. 136-139.

² Franklin Bank v. Steward, 37 Me. 519.

³ Morse v. Railroad Co., 6 Gray, 450; Malecek v. Tower Grove R. R. Co., 57 Mo. 17.

⁴ Wyman v. Hallowell Bank, 14 Mass. 58; Salem Bank v. Gloucester Bank, 17 Mass. 21.

⁵ Walker v. St. Louis Nat. Bank, 5 Mo. App. 214. But the principle of the decision could not be applied

to a signature of a drawer of a check.

⁶ East River Bank v. Hoyt, 41 Barb. 441.

⁷ Union Banking Co. v. Gillings, 45 Md. 181. Compare Merchants' Bank v. Marine Bank, 3 Gill, 96.

⁸ 4 Thompson on Corp., sec. 4918; Carrol v. Railroad Co., 82 Ga. 452.

⁹ Keysor v. Railroad Co., 66 Mich. 390; but this case is so confused that the reporter of the court despaired of a syllabus. See also Linderberg v. Crescent Mining Co., 9 Utah, 163, which case was a most laughable judicial aberration, and is now overruled. People v. Kessler, 13 Utah, 69.

holders to bind the corporation in any way; but when the stockholders are assembled as the ultimate governing body of the corporation in a stockholders' meeting, an admission made by such a body is under some circumstances an admission binding upon the corporation.¹⁰

§ 111. Notice to a bank.— This question is frequently of controlling importance in the law of banking, because much of the bank's business consists of dealings with negotiable instruments, or collateral deposited as security. If the bank is that of a private banker or a partnership, notice to the banker himself, or notice to one of the partnership, is, of course, notice to the bank. It is the case of notice to any other individual. This is so in the case of an unincorporated association, even though the particular partner has an interest in the transaction adverse to the partnership.¹ But both private bankers and corporations, the former by choice and the latter by necessity, deal with the public through agents. A private banker may receive notice through an agent, the incorporated bank can receive notice only in this way. The rules governing the question in the case of both private bankers and corporations are identical. The first inquiry must always be whether the agent received the notice in the line of his duties in the bank, or whether he obtained his knowledge in his private capacity. At the outset it is necessary to lay down the principle clearly that where the agent receives notice of a fact while he is acting upon the bank's business, being duly authorized to act, he is identical with the corporation, and notice received by the agent under such circumstances is notice once for all to the corporation. Secondly, where an agent acts for the corporation, and the corporation insists upon his act as giving it a right, it adopts his act *in toto*. It cannot adopt what is favorable to itself and repudiate what is not favorable. If the notice was received by the agent in the line of his duty, the bank will be bound by notice so received.² Within this

¹⁰ 4 Thompson on Corp., sec. 4919.

² *Ihl v. St. Joseph Bank*, 26 Mo.

¹ *Stockdale v. Keyes*, 79 Pa. 251. App. 129. If the notice is commu-

ule it is held that notice of facts to the general officers of the bank, such as cashier, president, or any active managing officer, received while such officer was acting in regard to the bank's business, is notice of such facts to the bank itself.³ No notice of facts stated in a letter received at the bank and there opened by the head book-keeper, whose duty it was to open and distribute the mail, is imputable to the bank.⁴ And notice to a receiving teller as to the disposition of a check received by him is notice to the bank.⁵ It is also true that notice of facts to an officer of the bank, whose duty it is to act upon such notice or to transmit it to the bank, will be considered as notice received in the line of his duty,⁶ however it was received, *unless the officer received the notice not in his official capacity and has an interest in the matter adverse to the bank itself.* This proposition leads us to the second consideration, and that is whether the knowledge was received by the officer of the bank in his official capacity. Mere private knowledge of some officer of the bank is not necessarily imputable to the bank. It is imputable to the bank when such officer communicated the knowledge to some officer or officers of the bank, whose duty it was to act upon the notice, or in whose line of duty in the

icated to the officer for the bank, the bank is bound. *National Bank v. Norton*, 1 Hill, 578.

³ As to cashier. *McLeod v. Fourth Nat. Bank*, 20 Fed. R. 225; *New Hope Co. v. Phoenix Bank*, 3 Comst. 56; *Stebbins v. Lardner*, 2 S. D. 27; *Fall River Bank v. Sturtevant*, 2 Cush. 372; *Loring v. Brodie*, 134 Mass. 453; *Gaston v. American Ex. Bank*, 29 N. J. Eq. 98; *Veasy v. Raham*, 17 Ga. 99; *Bank of America v. McNeil*, 10 Bush, 54. As to resident. *Bartlett v. Woodbine Bank*, 57 Ill. App. 425; *Louisiana State Bank v. Senecal*, 13 La. 525; *McCann v. State*, 4 Neb. 324; *Porter Bank of Rutland*, 19 Vt. 410; *Merchants' Nat. Bank v. McAnulty*,

31 S. W. R. 1091. As to any active managing officer. *Second Nat. Bank v. Howe*, 40 Minn. 390; *Savings Bank v. Holt*, 58 Vt. 166; *Newport Nat. Bank v. Tweed*, 4 Houst. 225; *Branch Bank v. Steele*, 10 Ala. 915.

⁴ *First Nat. Bank v. Fourth Nat. Bank*, 16 U. S. App. 1, 56 Fed. R. 967.

⁵ *Strauss v. Tradesmen's Nat. Bank*, 122 N. Y. 379.

⁶ *Fulton Bank v. New York Canal Co.*, 4 Paige, 127; *National Bank v. Norton*, 1 Hill, 572; *Bartlett v. Woodbine Bank*, 57 Ill. App. 425. If received by him officially, his adverse interest is wholly immaterial. See *Atlantic State Bank v. Savery*, 82 N. Y. 291.

bank the reception of such notice lay. Another statement of the rule would be that the knowledge must be received by the agent in his official capacity.⁷ The private knowledge gained by a director, outside of his duties at the bank, unless communicated to the board or to some officer whose duty it was to receive the notice, is not binding upon the bank.⁸ But this latter statement must be taken with the limitation that the particular officer who has the private knowledge did not act in the particular transaction in regard to which notice of the facts within such officer's private knowledge is sought to be imputed to the bank.⁹ This distinction between the reception of knowledge by the bank officer in the line of his official duty in the bank and the reception of knowledge on his private affairs is one of the greatest importance. In the first instance the knowledge of the agent is imputed to the bank on the principle of identity. The agent, while acting in the line of his duty, is the bank. Notice so received by the bank is absolute. It cannot be disputed; it binds all other officers of the bank in their dealings;¹⁰ it is binding upon all subsequent boards of directors.¹¹ But in the second case, where the agent's knowledge is gained in his private affairs and wholly outside of the scope of his duties as an officer of the bank, the fact of knowledge on the part of the principal depends upon

⁷ Merchants' Nat. Bank v. Clark, 139 N. Y. 314; Bank of U. S. v. Davis, 2 Hill, 452; Washington Nat. Bank v. Pierce, 6 Wash. 491; Westfield Bank v. Cornen, 37 N. Y. 320. Goodloe v. Godley, 13 Smedes & M. 233, is a case in accord with the general rule, where agent was not authorized to act.

⁸ First Nat. Bank v. Christopher, 40 N. J. Law, 435; Farmers' Bank v. Payne, 25 Conn. 444; Shaw v. Clark, 49 Mich. 384; Mercer v. Canonge, 8 La. Ann. 37.

⁹ Bank of U. S. v. Davis, 2 Hill, 452; National Security Bank v.

Cushman, 121 Mass. 490; Clerk's Sav. Bank v. Thomas, 2 Mo. App. 367. These cases are wrong if they mean to hold that the presumption of notice is absolute. As we will see later on in this section the presumption of the communication of an officer's private knowledge may be rebutted by proof. See Fairfield Sav. Bank v. Chase, 72 Me. 226. Some cases deny this presumption.

¹⁰ Gibson v. National Park Bank, 98 N. Y. 87.

¹¹ Merchants' Bank v. Seton, 1 Pet. 299.

the fact as to whether or not the agent, if he did not act in regard to the particular matter, has communicated his knowledge to the principal.¹² Judges have confused the two things. If they are not kept distinct, a person dealing through an agent is either in a better or a worse position than if he dealt in the matter himself. The failure to observe this very plain distinction between a fact acquired by the agent in the line of his duty as agent, and the effect of the agent's private knowledge, has caused some exceedingly unjust decisions, as will appear in the next section. It is to be noticed further that officers of a bank performing a continuous course of service for the bank are within this rule considered as being engaged in one transaction. If the knowledge of such an officer of a fact has been acquired during the course of his authorized dealings for the bank, his knowledge is treated as if it were a part of each particular transaction of the bank.¹³ This rule certainly applies to all the general executive officers of the bank as well as to those agents whose duties require them to be engaged in a continuous line of service for the bank. It follows that the bank will not be heard to dispute its knowledge received in this way.¹⁴ But there are cases which have lost sight of this distinction and

¹² Some cases put the case of knowledge received during the course of the agent's business for the bank upon this ground also. See *Pierce v. Red Bluff Hotel Co.*, 81 Cal. 160, 166. But this is wrong. If it were a mere question of communication, the presumption would be open to dispute, or the communication would need to be proven. This conclusion is escaped by calling it a conclusive presumption. But the calling of it a conclusive presumption only amounts to saying that the identity exists. Why does it exist? is the question. The only answer we can make is that originally in the English law it

does not exist. Pollock & Maitland, *Hist. Eng. Law*, 529 et seq. But it did exist in the Roman law, and the experience of the ages has decided that the Roman law was correct. "*Eadem est persona domini et procuratoris. Eadem, inquam, non rei veritate, sed fictione,*" quoted 7 Am. Law Rev. 63.

¹³ *Holden v. New York & Erie Bank*, 72 N. Y. 286; *Craigie v. Hadley*, 99 N. Y. 131; *First Nat. Bank v. Peisert*, 2 Penny. 277.

¹⁴ *Strauss v. Tradesmen's Bank*, 122 N. Y. 379; *First Nat. Bank v. Peisert*, 2 Penny. 277, and *Winslow v. Harrimon Iron Co.*, 42 S. W. R. 698.

cannot be considered as properly decided.¹⁵ If the bank has once acquired knowledge through an agent competent to receive it, who receives it officially, the notice is always binding upon it. Yet it has been held that if the particular officer with the knowledge did not know of the transaction, or was not present in the bank at the time, and did not act in the transaction, his knowledge received in the course of his duties will not be imputable to the bank.¹⁶ These cases cannot be sound, and are not in accordance with authority,¹⁷ for notice once given to the bank, or received by it, is thereafter not dependent upon the continuous presence of the officer through whom the notice was derived. It follows also, in regard to such notice, that it is perfectly immaterial that the officer through whom the notice came to the bank had an interest adverse to the bank in the particular transaction wherein notice was acquired. He was identical with the bank, where he acquired the knowledge, and the question of communication is not involved, and the bank, by adopting the transaction, adopts his act. While, perhaps, no case holds this exact language, it is the necessary result of the principle and the decisions.¹⁸ Turning now to the case where an officer has acquired knowledge in his own

¹⁵ See cases in note 16.

¹⁶ *Memphis Nat. Bank v. Sneed*, 97 Tenn. 120; *Fulton Bank v. New York Canal Co.*, 4 Paige, 127. These cases can be considered correct only on the theory that the court held that the officer had not received the knowledge officially.

¹⁷ *Bank of America v. McNeil*, 10 Bush, 54; *Central Nat. Bank v. Levin*, 6 Mo. App. 543; *First Nat. Bank v. Peisert*, 2 Penny. 277; *Strauss v. Tradesmen's Bank*, 122 N. Y. 379. *Holm v. Atlas Bank*, 84 Fed. R. 119, correctly decides that the knowledge received by an officer not officially, and where he did

not act for the bank, is not imputable to the bank.

¹⁸ *Twenty-Sixth Ward Bank v. Stearns*, 148 N. Y. 515; *Nesbit v. Macon Bank*, 12 Fed. R. 686; *Holten v. New York & Erie Bank*, 72 N. Y. 286; *Stebbins v. Lardner*, 2 S. D. 127. The analogy of a private principal is the same. *Stockdale v. Keyes*, 79 Pa. 251. See *Huffcutt on Agency*, secs. 144, 145, and *First Nat. Bank v. Allen*, 100 Ala. 476. But *Louisville Trust Co. v. Louisville R. R.*, 75 Fed. R. 433, overlooks this distinction and is wrong.

private affairs, whether or not such knowledge will be imputed to the bank depends upon circumstances. His private knowledge will never be imputed to the bank unless he communicated it, or unless he acted in the particular transaction wherein it is sought to impute knowledge to the bank.¹⁹ If he did not act in the transaction, the fact of his communication of his knowledge must be proven as a fact.²⁰ The burden of proof is on the person claiming the communication.²¹ It may be inferred from the fact that the agent had such private knowledge;²² but that seems an extreme rule. If the officer having the knowledge acquired outside of his duties as agent acted in the particular transaction, the bank will not be bound unless it appears that such knowledge was present in the mind of the officer when he acted.²³ This may be inferred from circumstances and his recent acquisition of the knowledge.²⁴ It makes no difference, in case the officer acted, how he acquired his knowledge, whether in a transaction adverse to the interest of the bank or not,²⁵ because the bank's knowledge does not depend upon the fact of communication, but on the fact of an officer acting as to a transaction with the knowledge upon it, which gives the bank notice.²⁶ A limitation is put upon this rule by some courts to the effect that the agent with

¹⁹ If it is communicated, of course, the bank has knowledge. *Bank of Pittsburgh v. Whitehead*, 10 Watts, 397. The principle is laid down in *Fairfield Sav. Bank v. Chase*, 72 Me. 226; *Atlantic State Bank v. Savery*, 82 N. Y. 291.

²⁰ See cases cited in note 8.

²¹ *Constant v. University*, 111 N. Y. 604. But some courts say there is a presumption of communication if the officer in the transaction wherein notice is sought to be imputed had no adverse interest or no duty or reason to conceal the knowledge.

²² *Continental Nat. Bank v. McGeoch*, 92 Wis. 286. Compare *Custer v. Tompkins Co. Bank*, 9 Barr, 27.

²³ *The Distilled Spirits*, 11 Wall. 356; *Campbell v. First Nat. Bank*, 22 Colo. 177.

²⁴ *Brothers v. Bank*, 84 Wis. 381. But see note 9 to § 111, *ante*, as to a presumption.

²⁵ *Union Bank v. Wando Mfg. Co.*, 17 S. C. 339; *Hughes v. Settle*, 36 S. W. R. 577. The rule presupposes that the agent acquired his knowledge in his own private affairs.

²⁶ *Union Bank v. Campbell*, 4 Humph. 392.

the knowledge must alone have acted for the bank;²⁷ but there is no reason for such a rule, and it is not sound.²⁸

§ 112. **Agent with adverse interest.**—We have already discussed the question of the bearing of the agent's adverse interest in another transaction wherein he acquired knowledge which is sought to be imputed to a bank in a transaction wherein he acted, where he had no interest. Such knowledge was seen to be a case of knowledge acquired either in his course of acting as agent, or as knowledge acquired about his private affairs. But where an agent is acting in a particular transaction wherein he has an interest adverse to the bank, two cases may arise. The person with whom the agent is transacting business may know of the agent's adverse interest or he may not. We have already seen what facts may show that the agent's interest is adverse, in a case where the agent's power to act is in question.¹ In such a case the person having the knowledge of the agent's lack of power is a wrong-doer with the agent, and he can claim nothing against the bank unless the bank insists upon the transaction.² But the question as to notice is a different one. The bank in the first instance may have a right to rescind or to refuse to be bound by the transaction, because the agent acted upon both sides; but this right it waives

²⁷ *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268.

²⁸ *Le Duc v. Moore*, 111 N. C. 516. See notes 3, 8 and 9, § 106, *supra*. But perhaps these cases are better authorities upon the proposition that an agent may act in a particular transaction wherein he is interested, if the bank ratifies it, and his knowledge, however acquired, where he acts for the corporation, is imputable to the corporation, whether the person treating with the corporation had notice of his lack of knowledge or not. The

case of *Graham v. Orange Co. Nat. Bank*, 35 Atl. R. 1053, can only be considered sound on the theory that the officer with the adverse interest acted for himself and some other officer acted for the bank.

¹ See §§ 107, 108, *ante*.

² *Savannah Bank v. Hartridge*, 75 Ga. 149; *First Nat. Bank v. Gifford*, 47 Iowa, 575. But it must be remembered that the fact of the agent's adverse intent does not make him a wrong-doer. The transaction must be one where he is using the bank for his own benefit.

when it adopts the transaction and insists upon it. Having adopted its agent's act, it adopted it altogether. This matter must be kept plainly in view, or only confusion will result. It presupposes the agent's power to act; but the question is whether facts that the agent knows will be considered facts known to the bank, where the agent is acting upon a matter where he is bound not to disclose such facts, or is interested in concealing his knowledge, and the bank is enforcing such a transaction. It presupposes also that the third person who is acting with the agent is not a wrongdoer as to the bank. If the third person, who claims that the bank had notice of certain facts through its agent, had no notice of the agent's adverse interest, the fact of such interest is immaterial as to him.³ That rule applies both to the transaction in which the notice of the fact was acquired, and to the after transaction in which the notice or knowledge acquired in the former transaction is sought to be imputed to the bank. In the latter transaction it is plain that the same or different officers may be acting for the bank. But if the third person has notice of the agent's adverse interest in a former transaction in regard to which the agent was acting not for the bank, and the knowledge gained in such a transaction is such that needs to be communicated to the bank in order to bind it, that is to say, if it is knowledge acquired by the officer outside of his duties, there will be no presumption of a communication where the officer has an interest⁴ or a duty⁵ in concealing the matter. But where the fact is not one that needs communication, but is imputed to the bank by reason of the fact that it is within the officer's

³This result follows from the power of the agent to act in regard to a matter within the scope of his authority. See *United States Nat. Bank v. First Nat. Bank*, 79 Fed. R. 296; *Chemical Nat. Bank v. Armstrong*, 76 Fed. R. 339.

⁴*American Surety Co. v. Pauly*, 72 Fed. R. 470, 38 U. S. App. 254;

Hummel v. Bank of Monroe, 75 Iowa, 689. But if the wrongful act was perpetrated for the benefit of the bank, the bank has notice. *Merchants' Nat. Bank v. Tracy*, 77 Hun, 443. Compare *City of New York v. Tenth Nat. Bank*, 111 N. Y. 446.

⁵*Constant v. University*, 111 N. Y. 604.

knowledge by reason of facts learned in the discharge of his duties, or by reason of the fact that the officer has the power to act and is acting about the particular transaction with the knowledge present in his mind, the third person who charges such notice to the bank adopting the transaction, where he is himself acting in good faith and not a wrong-doer, will be held entitled to claim.⁶ Courts have not kept distinct the two transactions, the first being the transaction of which notice is to be imputed to the bank, the second being the transaction wherein notice is to be imputed to the bank. The same rule holds good as between two corporations dealing with each other through a common officer, as has been heretofore stated.⁷ This case is one where the officer of the bank is also acting as agent for another. It is merely one phase of an agent acting in a matter wherein he has an adverse interest, as was pointed out in section 106, *ante*. The cases ought to distinguish between knowledge acquired by the officer officially in the performance of his duties in the bank, and knowledge acquired by him outside of those duties; as, for example, while acting as agent for another. In the former case the agent's knowledge of the former transaction is imputable to the bank in the particular transaction, regardless of any adverse interest of the agent in the latter transaction. But the principle does not differ in the least whether the officer acts for another corporation as well as for the bank, or for another person as well as for the bank. There are certain cases,

⁶ First Nat. Bank v. Blake, 60 Fed. R. 78; Black Hills Nat. Bank v. Kellogg, 4 S. D. 312; Nesbit v. Macon Bank, 12 Fed. R. 686; First Nat. Bank v. Babbidge, 160 Mass. 563; Tilden v. Bernard, 43 Mich. 376.

⁷ Le Duc v. Moore, 111 N. C. 516; Corcoran v. Snow Cattle Co., 151 Mass. 74; Oak Grove Cattle Co. v. Foster, 41 Pac. R. 522; Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268. See § 106, *ante*. In 29 Am. Law Rev. 523, will be found an article by a well-known text writer which displays more confusion upon this subject than it is possible to find elsewhere. Every case that he states, except one or two, is capable of being fully explained, if the distinctions suggested in this section are kept clearly before the mind.

however, which are palpably erroneous, and they all show how the principles of the law, when misunderstood, can be made the engine of gross injustice. The case of *First National Bank v. Foote*, 12 Utah, 157, discloses that a note had been executed to the bank by the president thereof, the cashier thereof, and two other parties. The last two parties were accommodation makers, without any personal interest in the loan. After the note had been renewed several times, always by the same parties, the cashier had the two parties sign a new note, and informed them so as to make the matter an agreement that he, the cashier, would sign it, and that the president's signature would be obtained, and then the note would be delivered to the bank. The cashier did sign it, but, without obtaining the president's signature, put the note among the bank's discounts. This transaction was, of course, not binding on the bank, because the cashier had no power to take the new note and release the president. But the president, being in control of the bank, had the bank adopt the transaction by suing upon it. The cashier was then a felonious bankrupt, but the president was perfectly solvent. The whole transaction could have been found to be a scheme to let the president escape liability. It was held that the bank took the note as a *bona fide* holder, and that the knowledge of the cashier could not be imputed to the bank because he was on the note. But the question of notice was not really in the case. The question involved was one of power, and that was granted by the bank ratifying and adopting the transaction by suing on the note. The note was not made to a third party and negotiated to the bank, but was made directly to the bank. Hence the bank, having adopted the note, adopted the cashier's agreement in regard to the note, and consequently there was never any delivery of the note. The bank still had the right to sue on the former note. But the real question involved, even if it were considered one of notice, was whether the cashier's knowledge, he alone having acted for the bank, was the knowledge of the bank. The transaction having been adopted by the

bank, the whole of it was binding. The knowledge of the cashier was binding on the bank for two reasons: First, it was knowledge gained in the general line of his duty, and therefore the question of his interest was immaterial; second, even if not gained in the line of his duty, it was prior knowledge, which he must have had when he alone was acting for the bank in taking the note for the bank, and how he acquired the knowledge was immaterial. The court cites *Clafflin v. Bank*, 25 N. Y. 293, where the president of a bank having certified his own check, the form of the check was held notice of his lack of authority as to a holder of the check; the bank did not adopt the certification, but repudiated it; *Voltz v. Blackmar*, 64 N. Y. 440, where the rule of an agent's lack of power was held as against the agent himself; and *Bank v. Shawnee Co. Bank*, 95 U. S. 557, where the form of the paper was notice to the indorsee of the officer's lack of authority, the bank repudiating the transaction. It is painful to think that a court would cite cases which had so little application. The case denounces *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268. It is contrary also to *Twenty-sixth Ward Bank v. Stearns*, 148 N. Y. 515, and a number of other cases.⁸ This is one of those crude and ill-advised products of inadequate knowledge which bring so much discredit upon the law. Another case is *Terrell v. Branch Bank*, 12 Ala. 502. There a customer of the bank handed a note signed in blank to a director of a bank, and asked him to fill it in with a certain sum and renew his note at the bank. The director took the note, filled it in with a larger sum, and discounted it for his own benefit. The director acted for the bank in the discount as well as for himself. It was held that the bank had no notice. This

⁸ First Nat. Bank v. Blake, 60 Fed. R. 78; Le Duc v. Moore, 111 N. C. 516; National Security Bank v. Cushman, 121 Mass. 490. The case of Louisville Trust Co. v. Louisville R. Co., 75 Fed. R. 433, may be justified on the ground that there was no evidence to show the knowledge present in the mind of the president when he acted. But the court's language, general as it is, even if *dictum*, is erroneous.

se is an exceedingly incorrect and unjust decision, although the text-writer upon banking law has been so misled as to give it his earnest approbation. It may be said that the director had no power to bind the bank, and that the knowledge which he had was not acquired in the line of his duty. But if he acted for the bank in the discount of the note, and the bank adopted the transaction, as it did, his knowledge ought to have been held to be the bank's knowledge if the circumstances showed, as they did, that it was present in his mind. The case of *Commercial Bank v. Burgwyn*, 110 N. C. 267, may be justified on the ground that the director with knowledge did not act for the bank, but it is now overruled. The foregoing statement of the law applies where the officer who has an adverse interest acts for the bank as well as in his own interest. But where the officer does not act for the bank, but adversely thereto, while other officers act for the bank, the knowledge which the officer has gained in his private affairs, and not in the course of his duties at the bank, will not be imputed to the bank,⁹ and the rule is not changed by the fact that the officer acted for another corporation instead of for himself individually.¹⁰ For the same reason, practically, it was held that where an officer of the bank gave to a mortgagee certain worthless securities in release of a mortgage, whereupon the bank purchased the premises for full value, the bank is not charged with notice of its officer's acts.¹¹ While under some circumstances the form of negotiable paper may be notice to third parties

⁹ *Atlantic State Bank v. Savery*, 1 N. Y. 291; *National Bank v. Lovett*, 21 S. W. R. 825; *Buffalo Co. Bank v. Sharpe*, 40 Neb. 123; *City Bank v. Barnard*, 1 Hall, 80; *Lyne Bank of Kentucky*, 5 J. J. Marsh. 15; *Louisiana State Bank v. Senal*, 13 La. 525.

¹⁰ *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332; *Corcoran v. New Cattle Co.*, 151 Mass. 74; *First*

Nat. Bank v. Loyhed, 28 Minn. 396; *Benton v. German Am. Bank*, 122 Mo. 332; *Wilson v. Bank*, 7 Atl. R. 145; *Owensboro v. Daviess Co. Court*, 12 S. W. R. 930, 13 S. W. R. 101; *Washington Bank v. Lewis*, 22 Pick. 24; *Waynesville Bank v. Irons*, 8 Fed. R. 1; *Third Nat. Bank v. Harrison*, 10 Fed. R. 243.

¹¹ *Staples v. Huron Nat. Bank*, 66 N. W. R. 314.

where executed by the bank in favor of its officers, yet the fact that a director was an indorser on a note is no notice to any one that the note was for his accommodation.¹² This question of notice may be looked at from the standpoint as to whether the officer will be charged in his own private affairs with notice of facts known to the bank. The rule on principle would be that he could be charged with notice only of those facts as to which he had knowledge, and it would seem that this knowledge ought to be either actual or notice of such facts as it would be negligent in him to overlook.¹³ A final caution should be added in these matters of representation of a bank by its officers, and that is, to look only to the facts of the case and the decision; the reasoning and remarks of the court are too often not valuable.

¹² *Commercial Bank v. Cunningham*, 24 Pick. 270.

¹³ *Holland v. Citizens' Sav. Bank*, 17 R. I. 87.

CHAPTER VI.

DEALINGS OF BANKS.

ARTICLE I.—INFLUENCE OF CUSTOMS.

§ 113. **In general.**—There is no branch of business, unless it be shipping, where customs and usages cut so large a figure as in banking. In a former chapter the influence of usage in determining the duties of the various officers, as well as their powers, has been noticed. Customs have a large influence in governing the dealings of customers and traders at the bank.¹ The general principles of law as to usages are comparatively well settled, yet even here courts display a tendency in some instances to disregard the settled law. In the following sections cases are examined, but others will be found below.²

§ 114. **Usage must be lawful.**—A usage or a custom cannot change the express rule of law or statute.¹ Days of grace are sometimes established by statute, and therefore a custom cannot change that law;² but a custom can add another day to the three days allowed by statute or by the general rule of law.³ But where days of grace are established merely by the general local usage, a particular custom may exonerate a bank for failing to allow days of grace,

¹ *Allen v. Merchants' Bank*, 22 Wend. 215; *Bell v. Hagerstown Bank*, 7 Gill, 216.

² See §§ 261 and 288, *post*.

³ *Piscataqua Ex. Bank v. Carter*, 30 N. H. 246; *Bank of Alexandria v. Deneale*, 2 Cranch, C. C. 488; *Marine Bank v. Chandler*, 27 Ill. 525; *First Nat. Bank v. Taliaferro*, 72 Md. 164; *Shaw v. Jacobs*, 89 Iowa, 713; *First Nat. Bank v. Nelson*, 105

Ala. 180; *Allen v. St. Louis Nat. Bank*, 120 U. S. 20.

² *Morrison v. Bailey*, 5 Ohio St. 13, *Bowen v. Newell*, 8 N. Y. 190; *Mechanics' Bank v. Merchants' Bank*, 6 Met. 13; *Perkins v. Franklin Bank*, 21 Pick. 483.

³ *Renner v. Bank of Columbia*, 9 Wheat. 581; *Bank of Washington v. Triplett*, 1 Pet. 25.

thereby discharging an indorser.⁴ Two cases are found which solemnly hold that a bank cannot increase the legal rate of interest by a custom.⁵ It ought not to require a judicial decision to determine that a man, by habitually violating a law, cannot obtain the right to violate it, and thus repeal it as to himself.

§ 115. Usage must be uniform, certain and general.—

It is said that a usage must be general; that one instance does not make a usage.¹ This means that a usage must be uniform and certain, and uniformly acted upon.² But it may very well be that the usage may be that of all the banks at one place or a particular bank at a place.³ But even if the usage is a general one among banks, if a particular bank has abandoned it the usage is non-existent as to that bank.⁴ Nor will the usage of any number of banks control a bank which has not adopted it.⁵ A person dealing with a particular bank is said to be presumed to know the usage of that particular bank,⁶ and it has been held that the bank may abrogate its usage without notice to its customer;⁷ but this decision cannot be correct because the customer is held to know the usage, and after he has found it out, by some species of omniscience, he is required to know that the bank has abrogated it. The contrary rule is correct.⁸

§ 116. Usage must be reasonable.—There is a saying ascribed to a noted political thinker that "man is a reason-

⁴ Haddock v. Citizens' Bank, 53 Iowa, 542. Compare Merchants' Bank v. Woodruff, 6 Hill, 174, which is *contra*, and cases in note 1.

⁵ Niagara Co. Bank v. Baker, 15 Ohio St. 68; Talbot v. First Nat. Bank, 76 N. W. R. 726.

¹ Duvall v. Farmers' Bank, 9 Gill & J. 31.

² Grissom v. Commercial Nat. Bank, 87 Tenn. 350.

³ See Williams v. National Bank, 70 Md. 343.

⁴ Isbell v. Lewis, 98 Ala. 550.

⁵ Williams v. National Bank, 70 Md. 343.

⁶ Patriotic Bank v. Farmers' Bank, 2 Cranch, C. C. 560; Kilgore v. Buckley, 14 Conn. 363. Compare Sahlien v. Bank of Lonohe, 90 Tenn. 221; Howard v. Walker, 92 Tenn. 452.

⁷ Citizens' Bank v. Graffin, 31 Md. 507.

⁸ Barnes v. Ontario Bank, 19 N. Y. 152, 169.

g and not a reasonable animal." The fact that banks have metimes tried to insist upon customs which are not reasonable from any standpoint, not even their own, may be proof of the aphorism. Thus it was once insisted that a bank by custom could establish the rule that it would not correct its statement after a customer had left the banking room. Such alleged custom was held to be "immoral," unreasonable and void.¹ Such was the wrongful holding as to a usage to treat the passing of checks to the credit of the depositor as a receipt and not a transfer;² and a custom among banks to require a check indorsed by another bank and to return it after having credited it is unreasonable.³ On the same ground, probably, a bank's custom to notify a non-resident of the maturity of a note instead of demanding payment was judicially condemned⁴ where it was sought to hold the depositor.

§ 117. Usage must be known.— Even if a usage be lawful, reasonable and uniform, it does not necessarily bind anyone, unless it can be shown that the party sought to be charged with notice of the usage dealt with reference to it. It is apparent that a usage of this kind is only of value in interpreting a contract; it does not make a contract or prove one.¹ If it is shown that the parties had either actual or constructive knowledge of the usage, it will be presumed, nothing else appearing, that they contracted with reference to the custom, which will be considered as written into the contract. The question is therefore one of fact. The bank will be presumed to know its own customs or the customs of its business.² Such a custom may put it upon notice of

Gallatin v. Bradford, 1 Bibb, 209.

3 Second Nat. Bank v. Western Nat. Bank, 51 Md. 128.

Shaw v. Jacobs, 89 Iowa, 713. The principle of the decision was correct, but the great weight of authority is that a deposit of a check on another bank for credit is not sale but a bailment.

3 Comm. Ex. Bank v. Nassau Bank, 91 N. Y. 74.

4 Bank of Alexandria v. Deneale, 2 Cranch, C. C. 488.

1 Harper v. Calhoun, 7 How. (Miss.) 203.

2 Pope v. Bank of Albion, 57 N. Y. 126; Kilgore v. Buckley, 14 Conn. 363; Marrett v. Brackett, 60 Me. 524.

certain facts which it would otherwise have no notice of.³ The bank is bound by its own usages,⁴ and cannot abrogate them without notice to parties dealing with it.⁵ But as to third persons dealing with the bank the question of knowledge of the usage becomes of prime importance. If a third person has actual knowledge of a customary mode of dealing of a bank he will be bound by the custom.⁶ This actual knowledge will be inferred from the fact that he has chosen a particular bank with which to do business.⁷ It may also be inferred from the fact that the usage was a general one in the business,⁸ or was so notorious that a person in the position of the third party should have known it.⁹ Thus, the usages of a bank as to demand, notice of non-payment and protest are valid as to those who voluntarily select that bank to do business with,¹⁰ and as to those who reside in the particular place¹¹ as well as to those who have actual knowledge of the usage.¹² But if the third party has no knowledge of the usage, and cannot be charged with notice of it in the ways above indicated, he cannot be bound by it.¹³ Nor if a local usage has once been established by ju-

³ *Taliaferro v. First Nat. Bank*, 71 Md. 200.

⁴ See cases cited in last two notes.

⁵ *Barnes v. Ontario Bank*, 19 N. Y. 152; *Hotchkiss v. Artisans' Bank*, 42 Barb. 517. *Contra*, *Citizens' Bank v. Graffin*, 31 Md. 507.

⁶ *Sahlien v. Bank of Lonoke*, 90 Tenn. 221; *Bridgeport Bank v. Dyer*, 19 Conn. 136; *Pope v. Bank of Albion*, 57 N. Y. 131; *Renner v. Bank of Columbia*, 9 Wheat. 581; *Warren Bank v. Suffolk Bank*, 10 Cush. 582.

⁷ *Patriotic Bank v. Farmers' Bank*, 2 Cranch, C. C. 560; *Kilgore v. Buckley*, 14 Conn. 367. This rule applies to those who make notes payable at a bank as well as to those who indorse such notes. See *Mills v. Bank of United States*, 11

Wheat. 431; *Gindrat v. Mechanics' Bank*, 7 Ala. 324.

⁸ *Sahlien v. Bank of Lonoke*, 90 Tenn. 221.

⁹ *Citizens' Bank v. Graffin*, 31 Md. 507; *Grissom v. Commercial Nat. Bank*, 87 Tenn. 350.

¹⁰ See cases cited in note 7, *supra*.

¹¹ *Gindrat v. Mechanics' Bank*, 7 Ala. 324; *Gallagher v. Roberts*, 11 Me. 484; *Marine Bank v. Smith*, 18 Me. 99; *Shove v. Wiley*, 18 Pick. 558; *Wild v. Gorham*, 10 Mass. 366.

¹² *Lincoln Bank v. Page*, 9 Mass. 155; *City Bank v. Cutler*, 3 Pick. 414; *Bank of United States v. Norwood*, 1 Harr. & J. 423.

¹³ *Bank of Alexandria v. Deneale*, 2 Cranch, C. C. 488; *Lawrence v. Stonington Bank*, 6 Conn. 521.

dicial decision can a third party be affected by a change of that custom, where he is not shown to have been cognizant of the change.¹⁴

ARTICLE II.—BANKING POWERS.

§ 118. **In general.**—The various functions of a bank are largely a matter of usage as established by judicial decision. The matters of deposit, discount and issue will be treated under appropriate heads. But there are yet other transactions in which banks have sometimes become engaged which have required the judgment of the courts as to whether they were within the powers of a bank or not. Since the governing statute or charter generally defines the powers of a bank by general phrases, such as “the business of banking,” or a “general banking business,” the courts must in such cases be guided by the limits of the business as defined by general custom or the decisions of courts. Custom may be appealed to to show that an act is within the ordinary business of a bank.¹ Whenever the statute or the charter permits an act to be done by a bank, the terms of the statute or charter must govern. The same rule holds as to acts forbidden to a bank. The governing statute or charter may forbid an act by implication as well as by a direct prohibition, as in the case of national banks, which are by the terms of the national bank act impliedly forbidden to loan on real-estate security. The effect of an unauthorized act of banking has already been discussed.²

§ 119. **Dealing in its own stock.**—A bank may purchase its own shares unless the statute expressly or by implication forbids it,¹ but of course if the act is expressly or impliedly

¹⁴ *Cookendorfer v. Preston*, 4 How. 317. the effect of unauthorized acts of banking, where the objection is made on behalf of the state. The

¹ *Crain v. First Nat. Bank*, 114 Ill. 516. powers of savings banks are noticed in the chapter upon Savings Banks.

² See the former chapter entitled “Unauthorized Banking.” In a later chapter will be considered ¹ *Farmers’ Bank v. Champlain Transp. Co.*, 18 Vt. 131; *Robinson*

forbidden by its charter or by a governing statute it may not do so.² But how such a purchase can be a banking transaction, unless the stock is taken to cancel a stockholder's debt to the corporation,³ or as collateral to a debt, is hard to understand. There seems to be no difficulty in holding that a bank may take a lien upon its own shares to secure a previously existing debt,⁴ or that it may take its own shares to cancel a debt from a stockholder.⁵ National banks are prohibited from purchasing their own shares, nor can the bank by such a purchase, it has been held, vest title in another.⁶ But this latter case is wrong, because a national bank may under some circumstances sell its shares, and a purchaser in good faith would obtain a good title, whatever might be the holding as to one cognizant of the defect in the title.⁷ It has been held that one who sells to a broker, who is really acting for the bank, stock in the bank, makes a valid sale, where he did not know the broker was acting for the bank.⁸ Of course the bank can sell its own stock, even upon credit, where it has lawfully acquired it.⁹ Even if the purchase by bank officers were illegal it has been held that the bank may ratify the act;¹⁰ but an illegal act, our

v. Beall, 26 Ga. 17. *Contra*, German Sav. Bank v. Wulfekuhler, 19 Kan. 60. See also Bundy v. Jackson, 24 Fed. R. 628, as to a ratification.

² Gillett v. Moody, 3 Comst. 479; Myers v. Valley Nat. Bank, Fed. Cas. No. 9519.

³ Taylor v. Miami Ex. Co., 6 Ohio, 177.

⁴ German Sav. Bank v. Wulfekuhler, 19 Kan. 60.

⁵ Taylor v. Miami Ex. Co., 6 Ohio, 177.

⁶ Myers v. Valley Nat. Bank, Fed. Cas. 9519. This case holds that a national bank cannot be sued in trover for conversion of its shares, because judgment satisfied passes title to bank. But the case is hopelessly wrong, because under some circum-

stances the bank can acquire its own stock, and in any event its transfer is good. Wallace v. Hood, 89 Fed. R. 11.

⁷ If cognizant of the defect the purchaser could be said to be a party to an illegal transaction, yet it is the purchase and not the sale which is illegal. But the bank cannot agree to take shares in payment of a note which has been given to it for shares sold. Attwater v. Stromberg, 77 N. W. R. 963.

⁸ Johnson v. Laffin, 103 U. S. 800, 3 Dill. 65.

⁹ Union Bank v. Hunt, 7 Mo. App. 42.

¹⁰ Bundy v. Jackson, 24 Fed. R. 628.

highest court holds, cannot be ratified by the bank so as to make itself liable on a contract.¹¹ Sometimes the statute forbids a bank to loan money upon its own shares, and such a loan is illegal though made in the form of a deposit in another bank.¹²

§ 120. Purchasing stock of corporations.—A banking corporation has not the right to become a stockholder in another corporation,¹ unless the act is made necessary to preserve a security² which it has taken in a banking transaction, or unless it is permitted to do so in order to make a deposit of securities under a banking law.³ It has no power to subscribe for stock in a railroad corporation,⁴ nor to engage in the business of buying and selling stocks for profit;⁵ and if a bank buys stock in its own name which it has no authority to buy it will not be held as a stockholder.⁶ Where the bank is prohibited from purchasing or holding stock in another bank, it has been held that the bank cannot take a pledge of such stock.⁷ National banks have no power to engage in the selling of stocks⁸ or railroad bonds on commission,⁹

¹¹ See § 33, *ante*, and note 3, § 105, *ante*. But if it converts property it has agreed to sell, it is liable in conversion. *First Nat. Bank v. Anderson*, 172 U. S. 573.

¹² *Bank v. Lanier*, 11 Wall. 369. See also *Bridgeport Bank v. New York, etc. R. R. Co.*, 30 Conn. 270.

¹ *Bank of Commerce v. Hart*, 37 Neb. 197; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, and cases cited therein. But on a wrong construction of a statute it is held that the bank can do so. *Lati-mer v. State Bank*, 71 N. W. R. 225.

² See cases in notes 10, 11 and 12, *infra*.

³ *Curtis v. Leavitt*, 17 Barb. 309.

⁴ *Nassau Bank v. Jones*, 95 N. Y. 115. But see *City of Goodland v. Darlington Bank*, 74 Mo. App. 365.

⁵ *Talmage v. Pell*, 7 N. Y. 328.

⁶ *Cal. Bank v. Kennedy*, 167 U. S. 362.

⁷ *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350.

⁸ *Searle v. First Nat. Bank*, 2 Walk. (Pa.) 395; *First Nat. Bank v. Nat. Ex. Bank*, 92 U. S. 122.

⁹ *Weckler v. First Nat. Bank*, 42 Md. 581. This case was very well argued. It holds that a representation never ratified made by an agent as to an *ultra vires* contract is not within the scope of the agent's authority and therefore not binding on the bank. See *Willett v. Farmers' Sav. Bank*, 77 N. W. R. 519. The case is rightly decided as to that point. The third person had no right to rely on the representation. See also *Farmers' Nat.*

because such banks have only the powers that are granted to them by the national banking act.¹⁰ Yet those banks may accept stocks in satisfaction of a doubtful debt, and may, in order to settle claims wherein the bank is interested, pay a larger amount than would otherwise have been exacted and take stocks as part of the settlement, provided the stocks are taken to be sold afterwards and the act is necessary to avert loss.¹¹ National banks may loan money on the security of stocks, and may sell the same under a power,¹² and may purchase the same in order to protect their own interests.¹³

§ 121. Other mercantile and banking transactions.—It is perhaps needless to say that a bank cannot buy and sell merchandise,¹ but it may under peculiar circumstances have a single transaction of purchase,² and it may take charge of a shipment of goods in order to credit the amount on a bill which it holds,³ and if goods are taken as collateral the bank may ship and sell them.⁴ But a bank by merely collecting a draft attached to a bill of lading, where the collection is made in order to credit a depositor, does not become liable as the seller of the goods,⁵ although in such cases the bank has the power to take a bill of lading as collateral security.⁶ The bank, it seems, would not be held

Bank v. Smith, 77 Fed. R. 129, accord.

¹⁰ Matthews v. Skinner, 62 Mo. 329; First Nat. Bank v. Nat. Ex. Bank, 92 U. S. 122.

¹¹ First Nat. Bank v. Nat. Ex. Bank, 92 U. S. 122; s. c., 39 Md. 600.

¹² Canfield v. State Nat. Bank, Fed. Cas. No. 2382; Shoemaker v. National Mechanics' Bank, 1 Hughes, 101.

¹³ See cases cited in note 11. See also Farmers' Bank v. Detroit R. R. Co., 17 Wis. 383.

¹ Bates v. State Bank, 2 Ala. 451. The act of a cashier in agreeing to make loans for a person, being *ultra*

vires, the bank is not liable even though the cashier and president agree to defraud the customer, where the bank is not benefited. Grow v. Cockrill, 63 Ark. 418.

² Sackett's Harbor Bank v. Lewis Co. Bank, 11 Barb. 213.

³ Bates v. State Bank, 2 Ala. 451.

⁴ Commercial Bank v. Nolan, 7 How. (Miss.) 508. If the bank sells it may give a warranty of its title. Talman v. Rochester Bank, 18 Barb. 123.

⁵ Fourth Nat. Bank v. Mayer, 89 Ga. 108. See Addendum.

⁶ Freeman v. Bank, 3 Wills. Civ. Cas., sec. 339.

upon a representation as to what was being forwarded by the drawer of a draft which the bank was collecting.⁷ National banks being endowed with general banking powers have the right to do whatever is necessary to preserve their claims. Thus, such a bank may take an elevator stored with grain in payment of its claim.⁸ It may take and enforce a chattel mortgage in order to secure a previously existing debt.⁹ It may secure itself on an existing indebtedness by making an assignment from contractors with a city of money due or to become due to the contractors.¹⁰ It has power to engage in the business of dealing in government securities,¹¹ and will be liable for a failure to perform its contracts in regard thereto.¹² But a national bank has no power to make a donation to a manufacturing plant to prevent it from removing its plant from the city where the bank is located.¹³ It cannot make a valid agreement to procure insurance for a certain person, but it would, of course, be liable in *quasi-contract* for the benefit received.¹⁴ But where the transaction can fairly be said to be connected with a banking operation, the courts are liberal in permitting it. Thus a bank, where it has acquired property lawfully taken, may do what is necessary to make the property productive.¹⁵ It

⁷ *Littleton v. People's Bank*, 63 N. W. R. 666. This is a very close case and might just as well have been decided otherwise. The real ground of the decision ought to have been either that the representation was not one of fact or that the plaintiff did not rely upon it.

⁸ *German Nat. Bank v. Meadowcroft*, 4 Bradw. 630.

⁹ *Gaar v. Centralia Bank*, 20 Bradw. 611; *Spafford v. First Nat. Bank*, 37 Iowa, 181.

¹⁰ *First Nat. Bank v. Ottawa*, 43 Kan. 294. Or a bank may take an assignment of any account to protect itself (*Bank of North America*

v. Tamblin, 7 Mo. App. 570); or a judgment. *Harwood v. Ramsey*, 15 S. & R. 31.

¹¹ *Van Leuven v. First Nat. Bank*, 54 N. Y. 671; *Leach v. Hale*, 31 Iowa, 69; *Yerkes v. National Bank*, 69 N. Y. 382.

¹² See cases cited in last note; but compare *First Nat. Bank v. Hoch*, 89 Pa. 24.

¹³ *McCory v. Chambers*, 48 Ill. App. 445.

¹⁴ *Dresser v. Traders' Nat. Bank*, 165 Mass. 120. The bank should have been held liable on the contract under the doctrine stated in section 33, *ante*.

¹⁵ *Reynolds v. Simpson*, 74 Ga. 454.

may contract in order to prevent its own building from being injuriously affected by the erection of another building.¹⁶ It may receive personal property in exchange for its real estate.¹⁷ It may assign or sell its own judgment,¹⁸ or transfer it in payment of its own debt.¹⁹ It may take almost any species of property as collateral security unless forbidden to do so,²⁰ and in holding escrows, or in transactions analogous thereto, may hold securities to obtain the performance of the agreement.²¹ A bank may sell all its securities to another bank in consideration of the latter assuming all its liabilities.²² In Kansas the supreme court found it necessary to decide that a national bank could agree to pay interest on a city deposit.²³ The power of an ordinary chartered bank to maintain a savings department seems not to have been made the subject of adjudication. But since the receiving of deposits is a banking transaction, and since the maintenance of a savings department is merely one method of receiving deposits, there ought to be no doubt in the mind of any judge that such a proceeding is within the corporate power of either a national or a state chartered bank.

§ 122. Dealings in real estate.—The general rule applicable to all banking institutions which are incorporated is that they can acquire land only as permitted by their charters or governing statutes.¹ They have the power to acquire

This case, extraordinarily enough, holds that the question may be left to the jury.

¹⁶ *First Presby. Church v. Nat. State Bank*, 57 N. J. Law, 27, 58 N. J. Law, 406.

¹⁷ *First Nat. Bank v. Reno*, 73 Iowa, 145.

¹⁸ *Emory v. Joice*, 70 Mo. 537.

¹⁹ *Gilllett v. Campbell*, 1 Denio, 520.

²⁰ *Morris v. Dixon Nat. Bank*, 55 Ill. App. 298. The property here was board of trade options. This

would seem to be a simple process for putting the depositors' money into grain speculations.

²¹ *Bushnell v. Chataqua Co. Nat. Bank*, 74 N. Y. 290.

²² *Stetson v. City Bank*, 12 Ohio St. 577. Compare *Mitchell v. Beckman*, 64 Cal. 117, where it was held that after a long lapse of time the transaction would not be disturbed.

²³ *Interstate Nat. Bank v. Ferguson*, 48 Kan. 732.

¹ *State Bank v. Brackenridge*, 7 Blackf. 395. A law against a bank's

land and buildings only for the accommodation of their banking business.² It is a well-known fact that many banks have placed a large part of their capital in office buildings, a small part of which is used for the bank. But it is doubtful whether such a dealing can be justified without special power given in the charter.³ But where a bank has lawfully taken real-estate security, there can be no doubt of its power to purchase at its own sale.⁴ Or, if the bank has a lien upon real property, it may pay off prior liens in order to protect its own lien.⁵ There ought to be no question as to the bank's power to purchase at any execution sale, if the act be done to secure its own lien.⁶ While a bank has no power to buy land to sell it again, and while such a contract will not be enforced against either party,⁷ yet, unless prohibited by statute, the bank may take real-estate security or may take land in payment of its claim.⁸ If a national bank has loaned money to a purchaser of land with which to make the purchase, it may take the land in payment of its debt.⁹ It may

acquiring real estate applies in an other state. *Metropolitan Bank v. Godfrey*, 23 Ill. 579.

² *Thweat v. Bank of Hopkinsville*, 81 Ky. 1. Compare *Holt v. Winfield Bank*, 25 Fed. R. 812.

³ See, however, *Bands v. Poiteaux*, 3 Rand. 136, where it is held that a bank may buy more land than it needs and build buildings thereon and sell them out. The measure seems to have been taken to protect its own building by erecting fire-proof structures.

⁴ *Farmers' Bank v. Detroit R. R. Co.*, 17 Wis. 372; *Martin v. Branch Bank*, 15 Ala. 587; *Ingraham v. Speed*, 30 Miss. 410; *Merchants' Bank v. Harrison*, 39 Mo. 433.

⁵ *Brown v. Hogg*, 14 Ill. 219; *Zantingers v. Gunton*, 19 Wall. 32.

⁶ *Sherry v. Dunn*, 8 Blackf. 542. The same rule applies to national

banks. *Heath v. Second Nat. Bank*, 70 Ind. 106; *Holmes v. Boyd*, 90 Ind. 332; *Roebbling v. First Nat. Bank*, 30 Fed. R. 744.

⁷ *Bank of Michigan v. Niles*, 1 Doug. 401.

⁸ *Thomaston Bank v. Stimpson*, 21 Me. 195; *Baird v. Bank of Washington*, 11 S. & R. 411. The bank may agree to secure a release of a mortgage upon land covered by its own lien. *McCraith v. Nat. Mohawk Valley Bank*, 104 N. Y. 414. It may take real estate as security, though forbidden to own it. *Alexander v. Brumnett*, 42 S. W. R. 63. And if it takes real estate from a stockholder to cover a deficit it may hold it. *Brown v. Bradford*, 103 Iowa, 378.

⁹ *Turner v. First Nat. Bank*, 78 Ind. 19.

take the land and pay to the owner the difference between the value of the land and its own claim,¹⁰ or it may purchase its debtor's property at an execution sale, paying for the land more than its debt.¹¹ If a bank acquires land it may control it as a proprietor,¹² and, of course, may sell it.¹³ If it sells, it may take a mortgage back to secure the purchase price.¹⁴ There will be no presumption of illegality in the transaction. The illegality must be made to appear,¹⁵ and this rule applies equally well to every other transaction, whether of a bank or any one else. Finally, it is said to be the law that even if a bank takes the land contrary to law, it gets a good title against everybody except the state.¹⁶ But this is not believed to be true where there is an acquisition of land in violation of an express statute.¹⁷

§ 123. Dealings in mortgages on realty.—Where there is no statute either expressly or impliedly forbidding the acquisition by a bank of real-estate security, there can be no objection to such a dealing by the bank.¹ This right would include the power to take assignments of mortgages.² The bank, as a mortgagee, is entitled to the same remedies that any other mortgagee would have.³ A bank may take real-

¹⁰ *Mapes v. Scott*, 88 Ill. 352; *Libby v. Union Nat. Bank*, 99 Ill. 622.

¹¹ *Upton v. National Bank*, 120 Mass. 153.

¹² *Roebeling v. First Nat. Bank*, 30 Fed. R. 744.

¹³ *Wherry v. Hale*, 77 Mo. 20; *Jackson v. Brown*, 5 Wend. 590. If the bank conveys land it may make covenants of warranty. *Talman v. Rochester Bank*, 18 Barb. 123. If the deed of the bank is insufficient because not authorized, the deed may take effect as an equitable mortgage. *Stapylton v. Stockton*, 91 Fed. R. 326.

¹⁴ *National Bank v. Raymond*, 29 La. Ann. 355; *First Nat. Bank v. Kidd*, 20 Minn. 234.

¹⁵ *Chatauqua Co. Bank v. Resly*, 19 N. Y. 369; *Sparks v. State Bank*, 7 Blackf. 469; *Perkins v. Church*, 31 Barb. 84; *Richards v. Kountze*, 4 Neb. 200.

¹⁶ *Leazure v. Hillegas*, 7 S. & R. 313. As to national banks the rule is the same. *Mapes v. Scott*, 94 Ill. 379.

¹⁷ See *Zantzingers v. Gunton*, 19 Wall. 32.

¹ *Baird v. Bank of Washington*, 11 S. & R. 411; *Thomaston Bank v. Stimpson*, 21 Me. 195; *Merchants' Bank v. Harrison*, 39 Mo. 433.

² *Trenton Banking Co. v. Woodruff*, 2 N. J. Eq. 117.

³ *Gage v. Sanborn*, 106 Mich. 269; *Ahl v. Rhoads*, 84 Pa. 319; *Lewis v. Jeffries*, 83 Pa. 340.

state security to cover anticipated liabilities if not forbidden so to do.⁴ A mortgage given directly to the bank is good, although the statute may require it to be given to an officer.⁵ But in the case of national banks there is an implied prohibition against loaning on real-estate security, except to secure a pre-existing indebtedness. Originally, in New York under a similar statute, it had been held that a loan made at the time of taking the security was a pre-existing indebtedness.⁶ But the courts at first held that national banks could not take real-estate security, either to secure an indebtedness concurrently created or to be created in the future.⁷ But this statute was capable of producing so much injustice that it was authoritatively decided that the debtor could not make the objection.⁸ This ruling reconciles the law upon this subject to the distinction between *ultra vires* contracts and prohibited contracts stated in section 33, *ante*. There never was any doubt as to the right of a national bank to take real-estate security to secure a past indebtedness;⁹ or to take a mortgage made to a third party as collateral security for a loan to the mortgagee;¹⁰ or to make an agreement that the mortgage security should inure

⁴ Crocker v. Whitney, 71 N. Y. 31. The case was decided wrongly.

⁵ Kennedy v. Knight, 21 Wis. 345.

⁶ Silver Lake Bank v. North, 4 Johns. Ch. 370.

⁷ Matthews v. Skinner, 62 Mo. 329; Kansas Nat. Bank v. Rowell, 2 Dill. 71; Fowler v. Scully, 72 Pa. 456; Wood v. People's Nat. Bank, 83 Pa. 7. The statute could not be evaded by taking the mortgage to an officer of the bank. Fridley v. Owen, 87 Ill. 151. One case held statute to be directory. Magruder v. State Bank, 18 Ark. 9.

⁸ National Bank v. Matthews, 98 F. S. 621; National Bank v. Whitney, 103 U. S. 99; Winton v. Little, 4 Pa. 64; Graham v. National Bank, Stew. 804; State Nat. Bank v.

Flathers, 45 La. Ann. 75; First Nat. Bank v. Elmore, 52 Iowa, 541; Oldham v. First Nat. Bank, 85 N. C. 240. The same rule applies to a mortgage to secure future advances. Sessions v. First Nat. Bank, 93 N. Y. 269; National Bank v. Whitney, 103 U. S. 99.

⁹ Owen v. Merchants' Nat. Bank, 16 Kan. 341. A reorganized state bank might, as a national bank, take the assignment of a note along with the real-estate collateral. Scofield v. State Bank, 9 Neb. 316.

¹⁰ Fortier v. New Orleans Nat. Bank, 112 U. S. 439; Worcester Nat. Bank v. Chieney, 87 Ill. 602; Merchants' Nat. Bank v. Mears, 8 Biss. 158.

to the benefit of the bank, if its debtor, owning the mortgage, should make default.¹¹ The right of the bank to be subrogated to the rights of the mortgagee would not be defeated by the statute.¹² It was also held that the bank might take an assignment of a mortgage as collateral security even though the mortgage was made contemporaneously with the assignment.¹³ A renewal note was held to be not the creation of a new indebtedness, but simply evidence of the past indebtedness,¹⁴ which is, of course, the general rule. The effect of the statute against taking real-estate security is reduced to the effect the transaction would have as against the state complaining of a violation by the bank of its charter. Such a statute does not, however, abridge the bank's rights as to the acquisition of personal property,¹⁵ nor does it enlarge those powers.¹⁶ It should be stated in this connection that a bank has the undoubted right to mortgage its real estate to secure its debts.¹⁷

§ 124. Dealings in negotiable paper.— One of the proper functions of a banking institution being the acquisition of commercial paper, there can be no doubt as to the general authority of a bank to deal in promissory notes;¹ but some courts have denied the power of a bank to purchase negotiable paper;² but the better reason and authority is that the power of discounting includes the power of purchasing paper.³ Sometimes the statute prescribes the paper in which

¹¹ *First Nat. Bank v. Haire*, 36 Iowa, 443.

¹² *Matthews v. Abbott*, Fed. Cas. No. 9275.

¹³ *First Nat. Bank v. Andrews*, 7 Wash. 261. See also *Richards v. Kountze*, 4 Neb. 200; *Oldham v. First Nat. Bank*, 85 N. C. 240; *Thorn-ton v. Nat. Ex. Bank*, 71 Mo. 221.

¹⁴ *Howard Nat. Bank v. Loomis*, 51 Vt. 349.

¹⁵ *Farmers' Bank v. Detroit, etc. R. R. Co.*, 17 Wis. 372.

¹⁶ *Talmage v. Pell*, 7 N. Y. 323.

¹⁷ *Leggett v. New Jersey, etc. Co.*, Saxt. 541.

¹ *State Bank v. Criswell*, 15 Ark. 230; *Commonwealth v. Comm. Bank*, 28 Pa. 391.

² *Farmers' Bank v. Baldwin*, 23 Minn. 198; *First Nat. Bank v. Pier-son*, 24 Minn. 140. See also § 34, *ante*; *Lazear v. Nat. Union Bank*, 52 Md. 78.

³ *Pape v. Capitol Bank*, 20 Kan. 440; *Atlantic State Bank v. Savery*, 82 N. Y. 291; *Salmon Falls Bank v. Leyser*, 116 Mo. 51; *First Nat. Bank*

a bank shall deal; but such a provision does not prevent the bank taking other paper in order to secure a previous indebtedness.⁴ A bank has also the undoubted right to transfer its negotiable paper in the ordinary course of business,⁵ and it may indorse the same,⁶ and may guaranty the paper for its own benefit.⁷ One case holds that a bank may not assign its notes,⁸ but this was due to an absurd construction of an absurd statute. The statute sometimes prohibits a bank from issuing its bills or notes except in certain forms,⁹ or to circulate as money,¹⁰ but even in such case a bank may issue its note in the ordinary course of business.¹¹

§ 125. Borrowing money.—A bank with general banking powers may undoubtedly borrow money,¹ but sometimes the statute forbids the borrowing of money payable at a future day certain.² A national bank may borrow money in order to loan it out again at a higher rate of interest than it

v. Sherbourne, 14 Bradw. 566; Smith v. Exchange Bank, 26 Ohio St. 141; Nicholson v. State Bank, 92 Ky. 251. Bank may purchase interest coupons (First Nat. Bank v. Bennington, 16 Blatchf. 53); or a check (First Nat. Bank v. Harris, 108 Mass. 514); or a draft (Union Nat. Bank v. Rowan, 23 S. C. 339).

⁴ John v. Farmers' Bank, 2 Blackf. 367.

⁵ Planters' Bank v. Sharp, 6 How. 301; Marvin v. Hymers, 12 N. Y. 223; Robb v. Ross & Co. Bank, 41 Barb. 586.

⁶ Crockett v. Young, 1 Smedes & M. 241. See next section.

⁷ Dabney v. State Bank, 3 S. C. 124.

⁸ McIntyre v. Ingraham, 35 Miss. 25. The opinion, beyond being an excellent specimen of state rights, *ante bellum* balderdash, is chiefly remarkable for speaking of the United States Supreme Court as

"she!" This is the court that Sargent S. Prentiss was wont to call the Court of High Errors and Appeals.

⁹ See James v. Rogers, 23 Ind. 451; Safford v. Wyckoff, 1 Hill, 11.

¹⁰ Rockwell v. Elkhorn Bank, 13 Wis. 731.

¹¹ Rockwell v. Elkhorn Bank, *supra*.

¹ Tuttle v. National Bank of Republic, 48 Ill. App. 481. This opinion cites a work called "Aloise on Banking." Ringling v. Kohn, 6 Mo. App. 333; Donnell v. Lewis Co. Sav. Bank, 80 Mo. 165; Leavitt v. Yates, 4 Edw. Ch. 134; Barnes v. Ontario Bank, 19 N. Y. 152; Ward v. Johnson, 95 Ill. 215. A rediscount is not a borrowing, even if the bank indorses. It is a sale. National Bank v. First Nat. Bank, 79 Fed. R. 296.

² Commonwealth v. Bank of Mutual Redemption, 86 Mass. 1.

pays.³ It may loan borrowed money to its own directors if the loan is not otherwise illegal.⁴ National banks, for money loaned to them or deposited, may issue certificates of deposit payable on demand or a future day. Such certificates are not post notes within the prohibition of section 5183 of the Revised Statutes of the United States.⁵ But such certificates must represent an actual loan.⁶

§ 126. Lending of credit.—A bank has not the right to lend its credit on personal security, nor can it become an accommodation maker of drafts,¹ or an accommodation indorser of commercial paper;² but such indorsement or such accommodation draft is valid in the hands of a *bona fide* holder.³ Since it may receive special deposits, a national bank is liable for its negligence where it undertakes to recover stolen special deposits.⁴ A bank may guaranty the payment of a note discounted by it⁵ or sold by it.⁶ But a guaranty against loss given by the president to sureties upon a note to the bank, or upon any transaction not made by the bank, is beyond the power of the bank.⁷ A certification of a check is in effect a guaranty of its payment by the bank, and, as such, it may be oral,⁸ if the drawer has funds, or conditioned upon the payment of a draft left with it for collec-

³ National Bank of Commerce v. National Bank of Mo., Fed. Cas. No. 18,310.

⁴ Cases last cited.

⁵ Riddle v. First Nat. Bank, 27 Fed. R. 503; Hunt v. Appellant, 141 Mass. 515.

⁶ Logan Nat. Bank v. Williamson, 2 Ohio Cir. Ct. R. 118.

¹ Johnson v. Charlottesville Nat. Bank, 3 Hughes, 657.

² National Bank of Commerce v. Atkinson, 55 Fed. R. 465.

³ Johnson v. Charlottesville Bank, 3 Hughes, 657.

⁴ Wylie v. Northampton Nat. Bank, 15 Fed. R. 426, reversed 119 U. S. 361, holding the text.

⁵ Talman v. Rochester City Bank, 18 Barb. 123; Dabney v. State Bank, 3 S. C. 124. The rule is the same as to national banks. People's Bank v. National Bank, 101 U. S. 181.

⁶ Thomas v. City Nat. Bank, 40 Neb. 501.

⁷ First Nat. Bank v. Bennett, 33 Mich. 520. What the court probably meant to decide was that parol evidence was inadmissible to vary the terms of the written contract. Comm. Nat. Bank v. Pirie, 82 Fed. R. 799.

⁸ Merchants' Nat. Bank v. First Nat. Bank, 7 W. Va. 544.

tion.⁹ But one case decides that, where a man deposits securities with one bank, and that bank guaranties the securities to a second bank, which thereupon issues a letter of credit to the depositor of the securities, the guaranty is not binding upon the first bank.¹⁰ This case is clearly wrong, because the transaction was in effect a deposit of notes with the first bank, which thereupon discounted or transferred them to the second bank by guarantying their payment.

§ 127. Collections.— Since a bank, as one of its ordinary powers, has the right to receive paper for collection, it can be held liable for its neglects in performing that function.¹ There would seem to be no good reason why a bank has not the power to guaranty the paper it takes for collection, both as to the person depositing the paper for collection and as to the person from whom it collects.

⁹ Case last cited.

¹⁰ *Seligman v. Charlottesville Nat. Bank*, Fed. Cas. No. 12,642. But the court was in error in calling the transaction a guaranty. A representation by the bank as to the surplus and paid-up capital of an insurance company is *ultra vires*, but not a representation that the insurance company has so much money on deposit with the bank. *Hind-*

man v. First Nat. Bank, 86 Fed. R. 1013.

¹ *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276; *Mound City Paint Co. v. Commercial Nat. Bank*, 4 Utah, 353; *White v. Third Nat. Bank*, 4 Weekly Law Bul. 791. The power is incidental to banking. *Keyes v. Bank of Hardin*, 52 Mo. App. 323; *Yerkes v. National Bank*, 69 N. Y. 382; *Tyson v. State Bank*, 6 Blackf. 225.

CHAPTER VII.

DEPOSITS.

§ 128. **Nature of relation.**—When a man makes a general deposit in a bank the relation that exists between the bank and him, as a depositor, has not been accurately defined. It is settled that the relation is one of debtor and creditor;¹ so far all the courts agree. But a debtor, if he refuse to pay his creditor, can only be sued for the debt. A banker, however, can be sued not only for the debt, but he can be sued also for damages for refusing to pay the check which demanded the debt.² What is the nature of this further obligation? It is not one of contract at common law, because the form of the action is an action on the case.³ The banker is sued for a violation of his duty, which was to pay his depositor's checks as long as he had sufficient funds rightfully credited to the depositor. But every duty owed has its correlative right in the person to whom the duty is owed. It is the nature of this right that is in question. Some courts have said it is a contract right arising out of the agreement made by the bank with its depositor.⁴ It is certainly not an express contract, because no such contract is ever made. It is not a contract implied as of fact, because the measure of damages is that of tort and not of contract, and because wilfulness and maliciousness are a part of the act; not actual malice necessarily, but the malice that is implied from the doing of a wrongful act.⁵ Therefore the dis-

¹ *Bank of Kentucky v. Wister*, 2 Pet. 324.

² *Mt. Sterling Bank v. Green*, 99 Ky. 262.

³ *First Nat. Bank v. Shoemaker*, 117 Pa. 94.

⁴ *Marzetti v. Williams*, 1 Barn. &

Ad. 415. But *Taunton, J.*, shows that it is a breach of duty.

⁵ *Schaffner v. Ehrman*, 139 Ill. 109. See the appellant's brief in this case in 15 L. R. A. 134, discussing this question, but only succeeding in "darkening counsel." The opinion does not help the matter.

honoring of the check is a tort. The closest analogous relations are the duties owed by a common carrier or an innkeeper. In those cases the law raises the duty on motives of public policy out of the relation. So in the case of a banker and his depositor the law raises the duty out of the relation. Historically, the deposit in the bank is a bailment, belonging to the same general class as the carrier's and innkeeper's bailment. The relation of bailor and bailee imposes certain duties, a breach of which is redressed by a common-law action. Although the bailment has been in process of time changed to a debt, certain characteristic features of it have remained. There is a contract only in the sense of a *quasi-contract*.⁶ The contract is wholly *ex lege*; it is not the result of any agreement between the parties. It is true that in declaring on the carrier's duty in *assumpsit* a contract is pleaded, but that was merely the statement of the duty to charge an *assumpsit*. There was no consideration pleaded. *Assumpsit* was originally an action on the case, and the promise was considered important after the common-law pleaders had lost sight of this fact.⁷ The statement of the contract is now merely by way of inducement to show the relation out of which the law raises the duty. This is the form of pleading in case. So the ingredient of malice in the action for dishonoring a bank check and the allegation thereof in the declaration is merely a method of charging a failure of duty.⁸ It is wholly dispensed with in

⁶ See Keener on Quasi-Contract, 18, and the introduction to the present work. He makes the point that the duty enjoined is to act, which makes the carrier's duty *quasi-contract*. One case recognizes that the duty of a bank in case of a collection, which depends upon the same principle, is raised out of the relation, because where a contract to use proper steps in collecting is alleged it need not be proven if the relation is proven. *Jagger v. German-American Bank*, 53 Minn. 386.

⁷ See two articles on *assumpsit* by a very great authority in 2 Harvard Law Rev. 1, 53.

⁸ The failure to recognize this very palpable fact led the supreme court of Illinois in *Schaffner v. Ehrman*, 139 Ill. 109, to call this suit one in slander. It is no more a slander than the refusal of any debtor to pay his debt is a slander upon the creditor. It merely happens that one of the elements of damage is loss of credit.

code pleading; it is simply a way of saying that the bank acted unlawfully in violating the duty which the law raised out of the relation. The duty owed by a bank is just as much the result of a custom as is the duty of a common carrier or an innkeeper. The old form of declaration against an innkeeper was on the common custom of the realm. The custom simply became recognized by the courts and thus became a rule of law. Suppose the duty had been originally created by a statute; there would then have been no question of its *quasi-contractual* character. Another test would be this: Suppose a state statute should abolish the duty of a bank to honor its customer's checks and leave the remedy simply one of debt.⁹ It certainly could do so; yet if the relation is one of contract it could not do so as to future deposits; but it could not abolish the debt of the bank to its depositor as to a future transaction. If a statute should declare that a deposit of money in a bank should not create a debt, the statute would be void. But if it should say that the bank should not be responsible for more than the debt on failure to honor a check, the statute would be good. The debt is a genuine contract, therefore, and the other part of the legal relation is not.¹⁰ It will be seen later that this question is not a mere academic one, but has an important bearing upon questions in banking law.

§ 129. Kinds of deposits.—Deposits are either general or special. A special deposit may be of something else than

⁹ Statutes have varied the duties of innkeepers and carriers, and those statutes no doubt affected all future instances of the relation.

¹⁰ See *Louisiana v. New Orleans*, 109 U. S. 285, as to *quasi-contracts* not being within the protection of the constitution as to contracts. The case itself is wrong, however, where it decides that a *quasi-contract* can be abolished as an obligation by statute, except as to future

transactions; that obligation is protected by the clause in the fourteenth amendment as well as by the clause against the taking of private property. The *quasi-contract*, after the obligation has once arisen, is property. The dissenting opinion of Justice Harlan does not display any knowledge of the nature of a *quasi-contract*, although he was right in his conclusion.

money. Its characteristic feature is that title to the thing does not pass to the bank, except as bailee. We are concerned at present simply with general deposits.

§ 130. General depositor's rights.—A general deposit of money in a bank creates a debt from the bank to the depositor. The money becomes the banker's to use as he can.¹ Whether interest be paid or not,² whether the deposit be on an open checking account or a time deposit,³ the rule is the same. If it be a deposit in a savings bank, payable upon notice, the money belongs to the bank.⁴ The relation is not that of trustee and *cestui que trust*,⁵ although in some cases money placed in a bank by a depositor becomes a common-law trust. Those cases are where a specific sum of money is remitted to a banker to pay a specified debt, the relation is that of bailor and bailee, and the bank is a trustee for the amount;⁶ or where a person deposits money with one bank for transmission to his own bank,⁷ in which case the transmitting bank is not relieved from responsibility by turning the amount over to another bank to transmit, according to a custom not known to the person depositing the money;⁸ or where debts were due to a former owner of the bank which the bank collected and held in its general funds.⁹ The engagement of the banker, which is merely a poor phrase for his customary and lawful duty, is to honor and pay all drafts and checks drawn by the depositor upon the bank until the deposit is exhausted, and to repay upon demand any balance that remains due above the checks and drafts

¹ Bank of Kentucky v. Wister, 2 Pet. 324; Dabney v. State Bank, 3 S. C. 124; Robinson v. Gardner, 18 Gratt. 509, and numerous other cases.

² State v. Bartley, 39 Neb. 353.

³ Williams v. Rogers, 14 Bush, 776; Leaphart v. Commercial Bank, 45 S. C. 563.

⁴ Johnson v. Ward, 2 Bradw. 261.

⁵ Buchanan Farm Oil Co. v. Woodman, 1 Hun, 639.

⁶ City of St. Louis v. Johnson, 5 Dill. 241. Compare Aetna Bank v. Fourth Nat. Bank, 46 N. Y. 82.

⁷ Drovers' Nat. Bank v. O'Hare, 119 Ill. 646; Cutler v. American Ex. Nat. Bank, 113 N. Y. 593. See §§ 162, 163, 345, *post*.

⁸ Union Stock Yards Nat. Bank v. Dumond, 150 Ill. 501.

⁹ Parsons v. Treadwell, 50 N. H. 356.

or other claims lawfully paid.¹⁰ This relation is not varied in the least by the fact that the deposit may be or become payable to some one else than the depositor.¹¹ The bank may select its own depositors,¹² and the depositor is always entitled at reasonable hours to examine the books of the bank in order to ascertain the state of his own account.¹³ Bank bills received as cash are money deposited.¹⁴

§ 131. When the deposit is made.—Where money is deposited the deposit dates from the time the deposit is entered in the pass-book,¹ or where not entered there when received whenever the duplicate deposit slip is delivered to the depositor, or whenever the money is actually received at the bank. It will be a question of fact whether or not the bank has received the deposit. Leaving out of view peculiar cases, it seems plain that since the bank has a business house and an officer to receive deposits, a deposit is not made until it is delivered to that officer. This delivery must be a manual delivery. There being a window for the reception of the deposit, it ought to be the rule that until the deposit goes to the officer it is not made. Suppose a man puts his money before the window. The teller takes the money with the deposit slip. Then the deposit is complete. But if before that delivery is actually made some thief should snatch the money, the bank ought not to be responsible. It was held in an old case that the money is not deposited until it comes to the proper officer of the bank,² but the president³ or the

¹⁰ *Boyden v. Bank of Cape Fear*, 65 N. C. 13.

¹¹ *Bushnell v. Chataqua Co. Bank*, 74 N. Y. 290.

¹² *Thatcher v. State Bank*, 5 Sandf. 121. The rule ought to be that an incorporated bank could not make selection as to its depositors.

¹³ *Union Bank v. Knapp*, 3 Pick. 96.

¹⁴ *Corbet v. Bank of Smyrna*, 2 Harr. (Del.) 235; *Way v. Tuskegee Ins. Co.*, 34 Ala. 58.

¹ *Wasson v. Lamb*, 120 Ind. 514.

But the money must have reached the bank. Thus money in the post-office which the bank has refused to receive is not a deposit nor is the bank liable for its loss. *Simpson v. Pemegiwasset Nat. Bank*, 38 Atl. R. 1005.

² *Manhattan Co. v. Lydig*, 4 Johns. 377. The general principle of this case is right, but the actual decision is wrong. The same thing may

³ *Hazleton v. Union Bank*, 32 Wis. 34.

cashier⁴ or the paying teller⁵ can receive deposits as well as the receiving teller; and even if money is received without a deposit ticket being made out or an entry in the pass-book being made, the deposit is complete.⁶ But it must be the intention of the party to make a deposit.⁷ Nor will the alleged depositor be allowed to take inconsistent positions in trying to hold the officers personally liable and at the same time hold the bank liable.⁸ Difficult questions sometimes arise on account of the form of the transaction. A check in favor of the cashier was sent to the bank and it was cashed. It was held that such fact was no proof that the money was deposited in the bank.⁹ But this is certainly wrong, because if the man had handed the money to the cashier the bank would have been held. The mere mailing of checks to a bank for deposit is not proof of a deposit,¹⁰ without more appearing. But where the teller received a draft for collection and was instructed to collect it and deposit it to the sender's credit, or to the teller's credit as trustee, but the teller, after collecting it, deposited the money to his own personal credit, it was held that the deposit was complete.¹¹ So, where the cashier issued a certificate of deposit, although it had a memorandum put upon it by the cashier stating that the amount was to be paid to a creditor of the depositor, or, if not paid to him, was to be loaned for the depositor, the bank was held liable.¹² But this case is

be said of *Thatcher v. State Bank*, 5 Sandf. 121. The money was deposited in both cases.

⁴ *State Bank v. Kain*, 1 Ill. 45.

⁵ *East River Nat. Bank v. Gove*, 57 N. Y. 597. But in any case, except under very remarkable circumstances, the deposit should be received at the bank.

⁶ *Jackson Ins. Co. v. Cross*, 9 Heisk. 283. The depositor violated the rule of the bank, but the receiving teller also violated the rule.

⁷ *Calton v. Savings Bank*, 7 Conn. 487, a case with very peculiar cir-

cumstances. But the real reason for deciding the case as it was decided must be that the plaintiff never intended to make a deposit.

⁸ *Rich v. Niagara Co. Bank*, 5 Thomp. & C. 589; *Shields v. Niagara Co. Bank*, 3 Hun, 477.

⁹ *Gettysburg Nat. Bank v. Kuhns*, 62 Pa. 88.

¹⁰ *Miller v. Western Bank*, 172 Pa. 197.

¹¹ *Ihl v. St. Joseph Bank*, 26 Mo. App. 129.

¹² *First Nat. Bank v. Brooks*, 22 Ill. App. 238. Compare *Beckly v.*

wrongly decided, because it was not a banking transaction, and the depositor made the cashier his own agent, unless it can be said that the memorandum contradicted the certificate. In another instance a president of a bank issued his personal certificate, according to his habit of issuing either his own or the bank's certificate, but the customer thought he was dealing with the bank; a deposit was held to have been made in the bank.¹³ So, where the certificate of a private firm was issued, but the bank teller, in the presence of the customer, said it was "good on the bank," the bank was held upon the certificate.¹⁴ The same holding was made where no assurance whatever was given.¹⁵ Again, a man, being notified by the paying teller that his account was overdrawn, went to the bank and left with the paying teller the amount of the overdraft, but the paying teller embezzled it; the bank was held liable.¹⁶ In a peculiar case a bucolic bank permitted a customer to deposit money in a city bank to the credit of the country bank, with authority to draw upon it solely at the customer's request, and it was held that there was no deposit in the country bank.¹⁷ If a general principle is deducible from these cases, it is that if there be a delivery of money at the bank on the part of the depositor, with the intention of making a deposit, known to the officer of the bank, who receives it, the deposit in the bank is complete. No deposit can be made in the bank until it is fully organized.¹⁸

Commercial Bank, 39 S. C. 281, which seems *contra*.

¹³ West v. Elmira Bank, 20 Hun, 408.

¹⁴ Steckel v. Allentown Bank, 93 Pa. 376. This case is wholly irreconcilable with Allentown Bank v. Williams, 100 Pa. 123. The difference on which the court relies is a fantastic quibble.

¹⁵ Coleman v. First Nat. Bank, 53 N. Y. 388.

¹⁶ East River Nat. Bank v. Gove, 57 N. Y. 597.

¹⁷ Dustin v. Hodgen, 38 Ill. 352. But money left with the bank to deceive the examiner is not a deposit. United States v. Peters, 87 Fed. R. 984.

¹⁸ Long v. Citizens' Bank, 8 Utah, 104. The real point, however, in this case was that the paper, which was a certificate of deposit, was issued by the cashier to himself. There was proof that the bank had done business. Even a delivery at some place other than the bank binds the bank if it ratifies or ac-

§ 132. **Effect of entries in books.**—An entry upon the pass-book or in the bank books of a deposit is merely a receipt. It is explainable or revocable for mistake¹ by either the bank or the depositor, and the depositor may contradict the entry even though a by-law of the bank requires an examination as to correctness at the time of the entry.² The earlier cases show some remarkable judicial performances upon this subject.³

§ 133. **Deposit of other things than money.**—Where a man goes to a bank and deposits in it checks or drafts or other paper, the transaction may take different forms. The bank may purchase the paper. If it does, the transaction does not become a deposit, even though the cashier makes out a deposit slip to an illiterate man.¹ The paper may be deposited for collection to be made by the bank, but not for credit. If a specific instruction to that effect is given, it will be binding upon the bank receiving the paper; but whether or not it will be binding on third parties depends upon whether those third parties have notice. If the direction for collection, or for account, or for collection and credit is indorsed on the paper itself, that is sufficient notice to every one dealing with the paper that the depositor has never parted with his title.² If the paper is not so indorsed, any

quiesces in the transaction by a course of dealing. *Jumper v. Commercial Bank*, 26 S. E. R. 725.

¹*Talcott v. First Nat. Bank*, 53 Kan. 480; *Schneider v. Irving Bank*, 1 Daly, 500; *Branch v. Dawson*, 36 Minn. 193.

²*Mechanics' Bank v. Smith*, 19 Johns. 115.

³It was held that the entry on the books made an account stated, which could be attacked only for fraud. *Hepburn v. Citizens' Bank*, 2 La. Ann. 1007; *Mechanics' Bank v. Banks*, 11 La. Ann. 261. In another case it is said if the entry is made on the bank book first the

entry is conclusive: otherwise, not. *Manhattan Co. v. Lydig*, 4 Johns. 377. The true rule is that the books are *prima facie* correct. *Asher v. National Bank*, 7 Alb. L. J. 43.

¹*Bank of Guntersville v. Webb*, 108 Ala. 132.

²*Sweeney v. Easter*, 1 Wall. 166; *Commercial Nat. Bank v. Armstrong*, 148 U. S. 50; *National Butchers' Bank v. Hubbell*, 117 N. Y. 384; *Manufacturers' Bank v. Continental Bank*, 148 Mass. 553; *Crown Point Nat. Bank v. Richmond Nat. Bank*, 76 Ind. 561. And see § 175, *post*.

third party receiving the paper, such as a correspondent bank, may assume rightfully, in the absence of notice of a different state of facts, that the paper belongs to the bank transmitting it.³ When the funds are collected and in the collecting bank, whether or not those funds become a general deposit in the bank depends upon the course of dealing between the parties, if there has been one, or if there has been no course of dealing, and no express contract, except to collect, has been made, the funds after collection belong to the bank, and the relation of debtor and creditor exists between the bank and its depositor.⁴ But where there has been an express contract to collect the money and return the proceeds to the depositor, the express contract would overrule the general usages of the business,⁵ and the money in the hands of the bank would be a trust fund of the depositor.⁶ Such are the rules governing deposits for collection. But ordinarily a man who has checks or drafts takes them to his bank and deposits them for credit to himself. If nothing is said or written to indicate the intention, the deposit is for the depositor's credit.⁷ But where such a deposit is made, the question as to where the title remains is a much debated contention. If the checks or drafts are on the particular bank in which they are deposited, a credit of them as cash to the depositor is payment, and by the great weight of authority that payment is final and irrevocable.⁸ The checks,

³ *Cody v. City Nat. Bank*, 55 Mich. 379; *Vickery v. State Sav. Ass'n*, 21 Fed. R. 773. And see § 175, *post*.

⁴ *Marine Bank v. Fulton Bank*, 2 Wall. 252; *Commercial Nat. Bank v. Armstrong*, 148 U. S. 50; *Marine Bank v. Rushmore*, 28 Ill. 463; *Butchers' Bank v. Hubbell*, 117 N. Y. 384; *Reeves v. State Bank*, 8 Ohio St. 465.

⁵ *Continental Nat. Bank v. Weems*, 69 Tex. 489, where the contract was for collection and return of proceeds. This is the rule as between banks, and the same principle applies as between depositor and bank.

⁶ *Continental Nat. Bank v. Weems*, 69 Tex. 489. See also *McLeod v. Evans*, 66 Wis. 401 (overruled by *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237), and *Anheuser-Busch Ass'n v. Morris*, 36 Neb. 31. See § 343, *post*, for full discussion.

⁷ *Farmers' Bank v. Slayden*, 8 Tex. Civ. App. 63.

⁸ *Am. Ex. Nat. Bank v. Gregg*, 138 Ill. 596; *Bank v. Burkhardt*, 100 U. S. 686; *Bartley v. State*, 73 N. W. R. 744; *Oddie v. National City Bank*, 45 N. Y. 735. And see § 158, *post*, notes 5 and 6; *City Nat. Bank v. Burns*, 68 Ala. 267. *Contra*, *Na-*

thereupon, have passed from the ownership of the depositor. But if the bank receives such checks upon the express condition that they are not credited as cash, but are subject to further examination, the mere entry of them as cash will not preclude the bank from charging them back to the depositor.⁹ But a custom to that effect would not be valid.¹⁰ Where the checks or drafts deposited for credit are on another bank than the one receiving them, it is usual for them to be credited as cash. The point is, however, whether they pass to the bank as owner or as a mere bailee where they are credited as cash. All the cases agree that when such checks or drafts deposited for credit are collected and the money in the collecting bank, the relation of debtor and creditor exists,¹¹ unless there be some special agreement or understanding between the bank and its customer to the contrary. All the cases agree that all third parties may treat the bank in which checks have been deposited for credit of the depositor as the owner of the paper.¹² But where the title is during the process of collecting is a very different question. Some courts erroneously say that, if the depositor is allowed to check against the deposit, the title is in the bank.¹³ Other

tional Gold Co. v. McDonald, 51 Cal. 64. In Pennsylvania, if the drawee knows that the drawer has no funds, the bank may revoke the credit. *Patterson v. Union Nat. Bank*, 52 Pa. 206. *Rawl v. Saulsbury*, 66 Ga. 394, was a case of the bank's own check.

⁹ *Pratt v. Foote*, 9 N. Y. 463; *Rapp v. National Security Bank*, 136 Pa. 426.

¹⁰ This must follow from the fact that payment of a check is final. A custom to abrogate that rule of law would not be valid. See § 158, *post*.

¹¹ See note 4, *ante*, for cases. This rule applies between banks, and between the depositor and the bank. The two cases that seem to be opposed are *McLeod v. Evans*, 66

Wis. 401 (but *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, is in accord), and *Anheuser-Busch Ass'n v. Morris*, 36 Neb. 31. The collection is complete when credits are given between the different banks. *Ditch v. Western Nat. Bank*, 79 Md. 192; *Commercial Nat. Bank v. Armstrong*, 148 U. S. 50; *In re State Bank*, 56 Minn. 119. See also *First Nat. Bank v. Dickson*, 6 Dak. 301.

¹² See note 3, *ante*, and *Metropolitan Bank v. Loyd*, 90 N. Y. 530.

¹³ *Ex parte Richdale*, 19 Ch. D. 409; *Craigie v. Hadley*, 99 N. Y. 131; *National Butchers' Bank v. Hubbell*, 117 N. Y. 384; *Justt v. National Bank*, 36 N. Y. Super. Ct. 273; 2 *Morse on Banking*, 896. Some courts say this results from a deposit for credit. *Security Bank v.*

courts deny this, and say the right to check against the deposit is a mere privilege.¹⁴ This latter idea is the true one, because there is no question on the authorities but that the bank, having received checks or drafts on other banks as cash credited, has the right to revoke the credit if the collection is not made; but this would not be possible if title had passed.¹⁵ It does not help the matter to appeal to custom, because customs are facts, while title is a legal conclusion from the facts. One part of the custom may be to treat the deposit as cash, but the other part of the custom is to treat the credit as merely tentative. A custom cannot exist as to a legal conclusion. Therefore, we must fall back upon the facts. The Supreme Court of the United States once said the whole question is one of fact.¹⁶ That statement does not help the matter, because the facts being conceded the law must put a construction upon those facts. Now, on principle, a deposit of checks for credit on one bank upon another bank is a bailment.¹⁷ The duty of the bank is to

Northwestern Fuel Co., 58 Minn. 141; *Lanterman v. Travous*, 73 Ill. App. 670, 174 Ill. 459; *Am. Ex. Bank v. Mining Co.*, 165 Ill. 103; *Doppelt v. National Bank of Republic*, 175 Ill. 432; *Am. Trust & Sav. Bank v. Manufacturing Co.*, 150 Ill. 336. But these courts recognize that the bank can charge back the deposit.

¹⁴ *Balbach v. Frelinghuysen*, 15 Fed. R. 675; *Beal v. City of Somerville*, 50 Fed. R. 647, 5 U. S. App. 14. This last is the only able examination of the matter that has been made. It expressly disapproves 2 Morse on Banking, 896. See also *Scott v. Ocean Bank*, 23 N. Y. 289. The Supreme Court of the United States has followed the case of *Beal v. City of Somerville*.

¹⁵ See *Beal v. City of Somerville*, *supra*; *Stapylton v. Cie des Phosphates*, 88 Fed. R. 53. See also §§ 188, 189 and 190, *infra*.

¹⁶ *St. Louis & S. F. Ry. Co. v. Johnston*, 133 U. S. 566. But this case really decides that checks received and credited as cash against which the depositor has the right to draw, when the checks are on a different bank than the one receiving them, do not necessarily become the property of the bank. But the case is not in point, because it is put upon the ground that, even if it was a deposit, the bank became a trustee by reason of its fraud. If the deposit was really a purchase by the bank, and is so treated and acted upon by both parties, title, of course, passes. *Taft v. Quinsigamond Bank*, 52 N. E. R. 387. The case of *Evansville Bank v. German-American Bank*, 155 U. S. 556, says the legal title is in the collecting bank, but that it has not the equitable title.

¹⁷ *Giles v. Perkins*, 9 East, 12, 14; *Beal v. City of Somerville*, 50 Fed.

collect and credit the depositor with the amount obtained. When that is done the bailment is complete. The collecting bank takes no risk upon the paper; if collection is not made it charges the paper back to the depositor.¹⁸ If the bank fails in this duty it is liable for negligence.¹⁹ It would not be so if it owned the paper. Hence we are driven to conclude that the bank has no title until the collection is complete. The full reason for this conclusion will be found in sections 187 and 188. This conclusion is wholly compatible with the fact that a third party without notice may get title from the bank. That is the result of investing the bank with the indicia of ownership. This conclusion is, too, wholly compatible with the fact that the bank may sue upon the paper whether indorsed to it for credit or for collection. But it may do this as holder, although it is not the owner.²⁰ Each bank in the chain is a holder or bailee. But it cannot be said that this conclusion is the adjudicated law everywhere upon this subject. A very ably considered case so holds.²¹ But there are cases which hold that if the depositor is allowed to check against the deposit, the title passes to the bank.²² There are other cases which say that if the deposit is credited as cash the title passes to the bank.²³ The conflict of authority is not capable of being explained, but the true rule is that of *Beal v. City of Somerville*. The impor-

R. 647. And see §§ 181, 187-190, *infra*.

¹⁸ *Am. Trust & Sav. Bank v. Manufacturing Co.*, 150 Ill. 330; *Beal v. City of Somerville*, *supra*. This fact is what renders the decisions in note 13 so ingeniously absurd.

¹⁹ *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276; *Mound City Paint Co. v. Commercial Nat. Bank*, 4 Utah, 353.

²⁰ *Evansville Bank v. German-American Bank*, 155 U. S. 556; *Commercial Bank v. Armstrong*, 148 U. S. 50; *First Nat. Bank v. Hughes*, 46 Pac. R. 272. The case of *First Nat. Bank v. Payne*, 42 S. W. R. 736

(Ky.), can only be passed over in charitable silence.

²¹ *Beal v. City of Somerville*, 50 Fed. R. 647. And this case is followed in all the federal courts.

²² *Craigie v. Hadley*, 99 N. Y. 181, and cases cited in note 13, *ante*. One case says a deposit for collection and credit does not pass title. *Armstrong v. National Bank*, 90 Ky. 431. But the indorsement for credit always shows this fact by being to another bank.

²³ *Security Bank v. Northwestern Fuel Co.*, 58 Minn. 141; *Ditch v. Western Nat. Bank*, 79 Md. 192.

tance of the matter is as to who sustains the loss when the correspondent bank fails, and as to who owns the funds if the collecting bank should fail. These matters will be treated under the head of collections and insolvency.²⁴

§ 134. Ownership of deposit.—The natural presumption is that money deposited to the credit of a depositor by himself belongs to that depositor, and in reason the bank need only look to the apparent owner of the fund. If it pays that apparent owner of the deposit or one designated by him, the bank is fully protected.¹ But sometimes it will happen that money deposited to the credit of one man really belongs to another.² In such case, after notice as to who is the true owner of the fund, the bank cannot pay the apparent owner.³ If the bank pays the true owner of the fund it is always protected.⁴ The rule is believed to be settled that a bank cannot dispute the title of the depositor, except when the credit is claimed by the true owner, or when the same has been attached or garnished.⁵ When the form of the deposit is such that it is notice of the true ownership of the fund, the bank is compelled to act upon such notice.⁶ But

²⁴ See §§ 188–190, 343 and 344, *post*.

¹ *Daly v. New York Chem. Co.*, 2 Hall, 550; *Fulton Bank v. New York Canal Co.*, 4 Paige, 127; *McEwen v. Davis*, 39 Ind. 109; *Davis v. Panhandle Nat. Bank*, 29 S. W. R. 926. As to presumption see *Egbert v. Payne*, 99 Pa. 239; *Lockhaven Nat. Bank v. Mason*, 95 Pa. 113.

² See cases following.

³ *Providence Ass'n v. Citizens' Sav. Bank*, 19 R. I. 142; *Anderson v. Market Nat. Bank*, 1 N. Y. Supp. 136; *Frazier v. Erie Bank*, 8 Watts & S. 18; *Union Bank v. Johnson*, 9 Gill & J. 297. As to fact of notice see *Isom v. First Nat. Bank*, 52 Miss. 102; *Gibson v. Nat. Park Bank*, 98 N. Y. 87; *Eagle Mfg. Co. v. Belcher*, 89 Ga. 218.

⁴ *Lockhaven Bank v. Mason*, 95 Pa. 113; *Brown v. Kinsley Ex. Bank*, 51 Kan. 359. True owner may recover against the bank. *Starr v. York Nat. Bank*, 55 Pa. 364; *Smith v. Phila. Nat. Bank*, 1 Walk. (Pa.) 318. It is said that the bank can pay the true owner only when he has enforced his claim by legal process. *Lund v. Seamen's Bank*, 37 Barb. 129. But this is not true. See *Farmers' Bank v. King*, 57 Pa. 202; *First Nat. Bank v. Bache*, 71 Pa. 213; *Viets v. Union Nat. Bank*, 101 N. Y. 563; *Bank v. Waddel*, 100 N. C. 338.

⁵ *Citizens' Bank v. Alexander*, 120 Pa. 476; *Martin v. State Bank*, 7 S. D. 263.

⁶ See the next section.

the mere fact that the word "assignee" is appended to the depositor's name in the deposit is not notice to the bank that the credit belongs to any particular fund;⁷ nor is a deposit in the name of the county treasurer by itself notice that the fund belongs to the county.⁸ The whole test is whether under the circumstances the bank had reason to believe or ought to have known that some one else than the depositor owned the fund.⁹ If a mistake is made in the name in which money is deposited in the bank, the bank is bound to rectify the mistake, unless it has changed its position to its detriment by reason of the fact of deposit.¹⁰ But whenever there is a dispute as to the ownership, the bank acts at its peril in attempting to settle the matter for itself.¹¹ Payment into court under a bill of interpleader should generally be resorted to. It often happens that one man will make a deposit in another man's name. But that single fact does not operate as a transfer to the one in whose name the deposit is made.¹² Yet, of course, if it is an actual transaction between the two persons, or if it be a case of gift or declaration of trust, the title is complete in the third party or trustee.¹³ But the one who made the deposit, upon tender of the pass-book and proof of no transfer or gift, is entitled to recover the deposit against the bank.¹⁴ But no careful banker would be justified in acting unless the third party waives his claim, or unless there is no controversy. Assignments may be made of deposits in a bank. An oral assignment or declaration of trust of a deposit is good,¹⁵ but the

⁷ *Laubach v. Leibert*, 87 Pa. 55. See next section. *Caines*, 337; *Jameson v. Collins*, 11 Phila. 258.

⁸ *Eyerman v. Second Nat. Bank*, 84 Mo. 408. See next section. ¹² *Branch v. Dawson*, 36 Minn. 193. See *Douglas v. First Nat. Bank*, 17 Minn. 35; *Armstrong v. National Bank*, 53 Iowa, 752.

⁹ *California Bank v. Western Union Tel. Co.*, 52 Cal. 280; *White v. Springfield Inst.*, 134 Mass. 232; *Mfg. Nat. Bank v. Barnes*, 65 Ill. 69. ¹³ See case following and *Minor v. Rogers*, 40 Conn. 512; *Martin v. Funk*, 75 N. Y. 134.

¹⁰ *First Nat. Bank v. Belt*, 29 Ill. App. 194. ¹⁴ *Brodeneck v. Waltham Sav. Inst.*, 109 Mass. 149.

¹¹ *Parker v. Hartley*, 91 Pa. 465. It has no right to change a deposit. ¹⁵ *McEwen v. Davis*, 39 Ind. 109. Accompanied with change of de-

bank may require a written transfer.¹⁶ But a promise to transfer is not such an assignment as a bank may act upon.¹⁷ A written assignment of a deposit, accompanied by a delivery of the pass-book, is evidence of a complete assignment,¹⁸ although the deposit is made payable after the depositor's decease.¹⁹ But a mere delivery of the deposit slip is not an assignment even as to one who discounted a check upon the fact.²⁰ Notice of the assignment to the bank is necessary to protect the assignee,²¹ for a payment without notice is protected.²² After a bank has certified a check, so much of the deposit belongs to the bank. Such funds are therefore not attachable as the depositor's credit or debt from the bank, yet this self-evident proposition is disputed.²³ There may be liens upon the deposit, and the bank, if it have notice thereof, must protect the lien, otherwise not.²⁴

§ 135. Trust or partnership funds.—Where trust funds are so deposited that the bank is not chargeable with notice that they are trust funds, it is able to give credit upon them to the depositor, and is not liable for paying them out, as if they belonged to the depositor.¹ Yet as soon as the bank

posit (*Hillman v. McWilliams*, 70 Cal. 449), or without such change (*Risley v. Phoenix Bank*, 83 N. Y. 318). See cases in notes 17, 18, 19 and 20 to this section.

¹⁶ *McEwen v. Davis*, 39 Ind. 109; *Risley v. Phoenix Bank*, 83 N. Y. 318; *First Nat. Bank v. Clark*, 134 N. Y. 368. Bank cannot pay depositor after notice of assignment. *Griffin v. Rice*, 1 Hilt. 184; *Beckwith v. Union Bank*, 9 N. Y. 211.

¹⁷ *Coffin v. Henshaw*, 10 Ind. 277.

¹⁸ *Foss v. Lowell Sav. Ass'n*, 111 Mass. 285.

¹⁹ *Schollmeier v. Schoendelen*, 78 Iowa, 426.

²⁰ *First Nat. Bank v. Clark*, 134 N. Y. 368.

²¹ *Beckwith v. Union Bank*, 9 N. Y. 211.

²² *Griffin v. Rice*, 1 Hilt. 184; *Nightingale v. Chaffee*, 11 R. I. 609.

²³ See § 150, *post*; but see *Bills v. Park Bank*, 89 N. Y. 343. The court mistook completely the nature of the transaction of certifying. The decision may be justified upon the ground that the certifying was a mere fraudulent device.

²⁴ But where an attachment reaches legal interests no lien is created by a garnishment of a deposit, where the levy is upon the interest of the true owner, but the deposit stands in another's name. *Greenleaf v. Mumford*, 50 Barb. 543. Yet this decision appears to be wrong on the New York statute. See *Gibson v. Nat. Park Bank*, 98 N. Y. 87, and note 2 to § 137, *post*.

¹ *School Dist. v. First Nat. Bank*,

has notice of the trust character of the deposit it must act accordingly.² The bank will be held to have had notice from the words attached to the name of the depositor in the account indicating a trust relation, such as the word trustee³ or general agent.⁴ So, where a public officer deposits public moneys in his official name, the credit passes to the successor to that officer.⁵ But where moneys are deposited by a public officer in his individual name, the bank may treat the funds as those of the individual so long as it has no notice of its trust character.⁶ If the fund is deposited by an agent, which fact is known to the bank, the bank has notice that the fund belongs to some one else than the depositor.⁷ Where the fact of agency is disclosed, the bank has no right to assume that the agent has power to do anything more than deposit the money.⁸ It would be unsafe to rely upon the agent's statements as to who has authority to draw out the funds.⁹ But this proposition is disputed.¹⁰ The law ought to be that whoever deposits money has the right to draw it out, where words which merely describe his capacity

102 Mass. 174. See also *Ensman v. Delaware Co. Bank*, 87 Wkly. Notes Cas. 578; *In re Plankinton Bank*, 87 Wis. 378; *Wood v. Boylston Bank*, 129 Mass. 358. But the bank cannot apply the deposit to its own previously existing claim so as to cut off the true owner unless it in some way has a lien upon the deposit. *Burnett v. First Nat. Bank*, 38 Mich. 630; *National Bank v. Insurance Co.*, 104 U. S. 54. And see note 3 to § 140, *post*.

² *Bundy v. Monticello*, 84 Ind. 119; *Ihl v. St. Joseph Bank*, 26 Mo. App. 129.

³ See cases cited in last note.

⁴ *National Bank v. Insurance Co.*, 104 U. S. 54.

⁵ *Meridian Nat. Bank v. Hauser*, 145 Ind. 496; *Carman v. Franklin Bank*, 61 Md. 467. See also *Smith v. Board*, 48 N. J. Eq. 627. But *Eyerman v. Bank*, 84 Mo. 408, and

Swartwout v. Mechanics' Bank, 5 Denio, 555, are wrong.

⁶ *Long v. Emsley*, 57 Iowa, 11.

⁷ *Union Stock Yards Bank v. Gillespie*, 137 U. S. 411; *National Bank v. Insurance Co.*, 104 U. S. 54.

⁸ *Honig v. Pacific Bank*, 73 Cal. 464. Compare *Citizens' Bank v. Harrison*, 127 Md. 128, and § 143, *post*, note 12. See also *Bristol Knife Co. v. Bank*, 41 Conn. 421.

⁹ *Honig v. Pacific Bank*, 73 Cal. 464; *Bates v. First Nat. Bank*, 59 N. Y. 286; *Kerr v. People's Bank*, 158 Pa. 305.

¹⁰ See *Randolph v. Allen*, 73 Fed. R. 23, 41 U. S. App. 117, *semble*. If the money actually belongs to the so-called agent the bank is protected. *Kerr v. People's Bank*, 158 Pa. 305. If principal authorizes or ratifies, the bank is protected. *City Bank v. Kent*, 57 Ga. 283.

are appended to the deposit. Thus, where A. deposits money to the credit of A., "agent," A.'s check as agent ought to be good authority to the bank to pay, unless the name of the principal is disclosed or ascertained in some way. If the name of the principal be disclosed, then only that principal ought to have authority to authorize a payment to be made by the bank.¹¹ But where the deposit is to the credit of A., "trustee," the check of A. as trustee ought to be sufficient.¹² The difference between the agent and trustee is that one holds the legal title and the other does not; one has full power to deal with the property, the other has only a limited power, depending upon the terms of the agency. But where the question is between the bank and the agent, there is no question that the bank has no right to appropriate the deposit which it knows is made by him as agent to the bank's claim against the agent.¹³ The same is true as to trustees.¹⁴ So, in case of partnership deposits, the bank cannot pay out the money upon a private check of one of the partners¹⁵ unless there is such a custom of dealing.¹⁶

¹¹ *Honig v. Pacific Bank*, 73 Cal. 464. However the knowledge comes to the bank, either through the agent or the principal, is immaterial. *Farmers' Bank v. King*, 57 Pa. 202; *Lindsey v. Lambert Ass'n*, 4 Fed. R. 48.

¹² *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 333, says the private check of the individual is sufficient; but this case seems wrong. The reasoning is poor. The true rule is that a check by the trustee as trustee is good. *Anderson v. Walker*, 49 S. W. R. 937; *Duckett v. Nat. Mechanics' Bank*, 86 Md. 400. But anything else is a breach of trust.

¹³ *Lawrence v. Bank of Republic*, 35 N. Y. 320, as to an assignee; *Union Stock Yards Bank v. Gillespie*, 137 U. S. 411, as to an agent.

Compare *Laubach v. Lubert*, 87 Pa. 55; *Clemmer v. Drovers' Nat. Bank*, 157 Ill. 206.

¹⁴ *Central Bank v. Life Ins. Co.*, 104 U. S. 54; *United States v. National Bank*, 73 Fed. R. 379; *Clemmer v. Drovers' Nat. Bank*, 157 Ill. 206; *McDowell v. Bank of Wilmington*, 2 Del. Ch. 1. But bank bound by agreement to so apply. *Sayre v. Weil*, 94 Ala. 466. See *Hale v. Richards*, 80 Iowa, 164. In both these cases the bank was held estopped as against the depositor from saying that an application of a trust deposit already made was wrongfully made.

¹⁵ *Coote v. United States Bank*, 3 Cranch, C. C. 50; *Billings v. Meigs*, 53 Barb. 272. But if the bank can show that the money actually went

¹⁶ *Evans v. Evans*, 82 Iowa, 492.

The statement of the partner as to his authority will not justify the bank in acting upon it.¹⁷ A deposit to the credit of a corporate officer as such belongs to the corporation.¹⁸

§ 136. **Liability of bank as to trust funds.**—Trust funds are those which are credited in the bank to some person in a trust capacity, such as agent or trustee, or funds that are in fact either actually or beneficially the property of some one else than the ostensible depositor. Where the bank has no notice or knowledge of the trust, it may pay out or give credit upon the apparent authority.¹ Where it has notice of the trust, it cannot permit the funds to be taken out of the bank in known violation of the trust, or by a single trustee where there are two,² nor can the bank itself apply the funds in any way which it knows is a violation of the trust. But if the agent has authority to draw out the money, the bank is not required to look after a proper application of it,³ and in such a case the bank takes the risk as to the agent's authority.⁴ In the case of trust funds the bank assumes no responsibility, unless in some way it is put upon notice of a violation of the trust.⁵ By accepting an account

for partnership purposes, the form of the check becomes immaterial. *Coote v. United States Bank, supra.*

¹⁷ *Coote v. United States Bank*, 3 Cranch, C. C. 50.

¹⁸ *Lindsey v. Lambert Ass'n*, 4 Fed. R. 48.

¹ *Ensman v. Delaware Co. Nat. Bank*, 37 Wkly. Notes Cas. 518; *In re Plankinton Bank*, 87 Wis. 378; *Long v. Emsley*, 57 Iowa, 11; *Smith v. Des Moines Nat. Bank*, 78 N. W. R. 238. But it is held that where the bank claims the fund for itself, it is accountable to the principal regardless of notice. *Cady v. South Omaha Nat. Bank*, 49 Neb. 125. This is the true rule unless the bank by lending credit has become a *bona fide* holder. See note 13, *infra*.

² *Swift v. Williams*, 68 Md. 236;

Commercial Bank v. Jones, 18 Tex. 811. See also *Hatch v. Fourth Nat. Bank*, 147 N. Y. 184; *United States v. National Bank*, 73 Fed. R. 379; *Bank of Greensboro v. Clapp*, 76 N. C. 482. It makes no difference that the funds of the principal are mingled with the agent's funds. *Van Alen v. American Nat. Bank*, 52 N. Y. 1; but *contra*, *Beatty v. McLeod*, 11 La. Ann. 76.

³ *Randolph v. Allen*, 73 Fed. R. 23, 41 U. S. App. 117.

⁴ *Honig v. Pacific Bank*, 73 Cal. 464; *Robinson v. Chem. Nat. Bank*, 86 N. Y. 404.

⁵ *Loring v. Brodie*, 134 Mass. 453. But if administrator dies with a deposit, bank cannot pay to administrator *de bonis non* of intestate. *Slaymaker v. Farmers' Bank*, 103

in the name of a trustee, it does not undertake any supervision of the trust.⁶ But if the bank has reason to think or has notice that the funds do not belong to the person in whose name they are standing, it is sometimes placed in a position of much difficulty. Instances sometimes occur as between husband and wife. If the husband deposits money for both himself and his wife to draw upon, the pass-book being issued to the husband, the bank may safely assume the deposit to belong to the husband.⁷ But if the deposit is made in the name of the wife as her money, the bank cannot permit the husband to check it out on any statements of his.⁸ Express authority or ratification by the wife must appear.⁹ Yet, if the money really belonged to the husband and was not a gift to the wife,¹⁰ the bank would be protected in paying to the order of the true owner as in all other cases.¹¹ Even though the bank is informed that the money belongs to the husband when it is deposited in the husband's name, the wife can reclaim it if the bank has suffered no injury, but merely seeks to apply it on the husband's debt.¹² The same is true of all other cases where funds are in the bank as the property of one person, but in fact belong to another. So long as the bank has not paid them out without notice or lent credit or suffered a detriment, but itself seeks to hold the funds as belonging to the ostensible depositor, it will not be permitted to do so.¹³ Where money is deposited to

Pa. 616. If the bank permits the trust fund to be credited to the trustee personally, it is accountable to the principal, for it assists in the breach of trust. *Farmers' Loan Co. v. Fidelity Trust Co.*, 86 Fed. R. 541.

⁶ *Evans v. Evans*, 82 Iowa, 492; *Eyrich v. Capital State Bank*, 67 Miss. 60. The difficulty always lies in determining what puts the bank upon inquiry as to a misappropriation. As to agent, see *Union Stock Yards Bank v. Gillespie*, 137 U. S. 411; *National Bank v. Insurance Co.*, 104 U. S. 54. As to trustee, see *Howard v. Deposit Bank*, 80 Ky.

496; *Hammel v. First Nat. Bank*, 2 Colo. App. 571; *Scranton v. Farmers' Bank*, 24 N. Y. 424; *Gate City Ass'n v. National Bank*, 126 Mo. 82.

⁷ *Brown v. Brown*, 23 Barb. 565.

⁸ *Bates v. First Nat. Bank*, 23 Hun, 420, 89 N. Y. 286.

⁹ Case last cited.

¹⁰ *People v. State Bank*, 36 Hun, 607, 102 N. Y. 740.

¹¹ *Kerr v. People's Bank*, 158 Pa. 305. But see *German Bank v. Himstedt*, 42 Ark. 62.

¹² *Citizens' Bank v. Harrison*, 127 Ind. 128.

¹³ *Armstrong v. National Bank*, 53

pay to a certain person, if the person is not interested in the deposit and has not ordered or procured or agreed that the deposit should be so made,¹⁴ the deposit may be withdrawn at any time before notice to the person for whose use the deposit is made or a promise to pay that person.¹⁵ In case of corporate funds deposited in the bank,¹⁶ the bank cannot transfer them to the individual credit of an officer;¹⁷ but it was said in one case that the check of the corporation transferred by the officer to himself would not be notice of a misappropriation by the officer.¹⁸ But government deposits known to the bank to be government deposits cannot be permitted by the bank to be drawn out on private check.¹⁹ Some further cases will be noticed under the section in regard to a bank's application of deposits to pay off its own claims.²⁰ There are other cases where the bank actually acts as a trustee.²¹

§ 137. Attachment and garnishment of deposits.—A levy of a writ of attachment properly made, or a garnishment under a writ of attachment, or an execution upon a

Iowa, 752; *Union Stock Yards Nat. Bank v. Moore*, 79 Fed. R. 705; *Anderson v. Market Nat. Bank*, 1 N. Y. Supp. 136. *Contra*, *Boettcher v. Colorado Nat. Bank*, 15 Colo. 16, which is wrongly decided because the bank lost nothing; *Wood v. Boylston Nat. Bank*, 129 Mass. 358, which is rightly decided because the bank lost its debt. See further, *Burnett v. First Nat. Bank*, 38 Mich. 430; *Johnson v. Payne Bank*, 56 Mo. App. 257. But this rule does not apply to a trust completed.

¹⁴ *Mayer v. Chattanooga Bank*, 51 Ga. 325.

¹⁵ *Brockmeyer v. Washington Nat. Bank*, 40 Kan. 744; *Trustees v. Pace*, 15 Ga. 486; *Mayer v. Chattanooga Nat. Bank*, 51 Ga. 325, citing four English cases.

¹⁶ *Lindsey v. Lambert Ass'n*, 4 Fed. R. 48.

¹⁷ *Cushman v. Illinois Starch Co.*, 79 Ill. 281.

¹⁸ *Gate City Ass'n v. National Bank*, 126 Mo. 82. This case is wrong, because the fact would be notice, unless the check was of such a character that the bank could assume that the check was transferred properly by the officer to himself. The court in its decision does not see the point at all, nor does the annotator of 47 Am. St. R. 633.

¹⁹ *United States v. National Bank*, 73 Fed. R. 379.

²⁰ See § 140, *post*.

²¹ See § 341, *post*. Under such circumstances it is chargeable with all the duties and liabilities of a trustee.

deposit, creates a lien upon the property of the debtor in the writ or the execution, which is always considered to be a legal interest. The property sought to be reached may be either a legal interest in the chose in action, the deposit, or it may be merely an equitable one. Thus, if the deposit stands in the debtor's name, the debtor has a legal interest. If it stands in the name of some other person, but really belongs to the debtor, the latter has an equitable interest. Legal interests can generally be reached in the method fixed by the statutes of the particular jurisdiction. Sometimes equitable interests may be reached, also, by legal process. Thus in Massachusetts a fund in the name of a guardian may be reached by trustee process against the beneficiary,¹ and in New York a deposit in the name of another is reached by an attachment against the true owner.² Whenever equitable interests cannot be reached by process at law they can generally be reached by a creditor's bill.³ The bank is always a party to such an action, and the suit amounts to a *lis pendens*, therefore, as against the bank; but generally an injunction should be issued.⁴ In Pennsylvania that extraordinary thing called a *scire facias* bill of discovery seems to create a lien upon subsequent deposits.⁵ But assuming that the proceeding, whatever it may be, is sufficient to notify the bank, the bank must respect the lien, or the claim amount-

¹ *Simmons v. Almy*, 100 Mass. 239.

² *Gibson v. National Park Bank*, 98 N. Y. 87. *Contra* in *Kansas* (*Scott v. Smith*, 2 Kan. 438) as to a mere levy of execution and delivery of the deposit by the bank. But see, as to New York rule, *Bills v. Park Bank*, 89 N. Y. 343; *O'Connor v. Mechanics' Bank*, 54 Hun, 272, reversed in 124 N. Y. 324; and § 134, *ante*, note 23.

³ Illinois is an exception if the moneys are trust moneys for a beneficiary, where the trust has been created by some one other than the beneficiary. *Potter v. Couch*, 141

U. S. 296; Rev. Stat. of Ill., ch. 22, sec. 49.

⁴ Payments made in violation of an injunction are not good as to the bank. *Springfield Marine Co. v. Peck*, 103 Ill. 265. But a state court cannot issue an injunction against a national bank until final judgment, while a United States court can. See § 352, *post*.

⁵ *Schram v. Cartwright*, 16 Pa. Co. Ct. R. 618. The early error of Pennsylvania in refusing its courts chancery jurisdiction has produced some singular results.

ing to a lien, from the time it has notice thereof.⁶ The garnishment only applies to the amount actually due at the time,⁷ whatever be the condition of the account as shown by the books of the bank, for payments made before notice, although not entered upon the books, are good.⁸ The bank's prior lien is protected,⁹ and the bank, if it has notice of the claim of some one else than the depositor, cannot pay the deposit to the depositor's garnishing creditor.¹⁰ But it seems to be held that money deposited to pay a check or other claim can be garnished as the property of the depositor until paid or promised to be paid to the third party called the "usee."¹¹ The true owner, whether indicated in the deposit¹² or not,¹³ is entitled to the deposit as against the depositor's garnishing creditor. But even if the fund is deposited to the credit of an agent, if no third party claims the fund the garnishment is good.¹⁴ The trustee must protect the rights of his beneficiary as well as his own.¹⁵ If the bank is adjudged to pay over the amount after notice to the beneficiary, the payment will be a discharge as to the amount paid.¹⁶ The bank must exercise the greatest care in regard to the garnishment, because a misnomer, even as to the middle initial, would exonerate the bank for not regarding the garnishment, if it had no other knowledge on the sub-

⁶ Merchants' Bank v. Meyer, 56 Ark. 499; Exchange Bank v. Gulick, 24 Kan. 359. All the cases cited to this section recognize the principle. But it is held that an assignment of the deposit before garnishment gives the assignee the better title. See § 362, *post*, notes 8-10.

⁷ Johnson v. Brant, 38 Kan. 754.

⁸ Foster v. Swasey, 3 Woodb. & M. 364.

⁹ Rice v. Third Nat. Bank, 97 Mich. 414.

¹⁰ Adams Co. v. National Bank, 9 N. Y. Supp. 75.

¹¹ Mayer v. Chattahoochie Nat. Bank, 51 Ga. 325.

¹² Cotton Mills Co. v. Cooper, 93 Iowa, 654. The deposit was to the credit of a person as agent.

¹³ Skilman v. Miller, 7 Bush, 428.

¹⁴ Proctor v. Greene, 14 R. I. 42.

¹⁵ Randall v. Way, 111 Mass. 506.

¹⁶ Randall v. Way, 111 Mass. 506; Leonard v. New Bedford Bank, 116 Mass. 210; Woods v. Milford Sav. Inst., 58 N. H. 184. But if the bank was negligent in defending the action, or if it was guilty of collusion, it will not be a defense. See § 363, *post*, note 1, as to savings banks.

ject.¹⁷ The amendment of the writ would not cover inconvenient payments.¹⁸ This matter is of special importance where the holder of a check can sue the bank after presentation, while funds to meet the check were in the bank. The fact that checks are outstanding is no defense against the garnishment of the deposit,¹⁹ unless the checks have been certified or accepted,²⁰ except in those states which permit the holder to sue the bank, and in that case checks outstanding would be a defense only after the checks had been presented.²¹

§ 138. Death of depositor.—We have already examined the cases as to ownership of a deposit caused by a voluntary transfer or assignment, and those caused by a transfer by act of the law upon garnishment or other legal proceeding. We come now to the transfer that takes place upon the death of the depositor. If the depositor has made a valid assignment at law of the whole deposit in his life-time,¹ although the time of the assignee's enjoyment was postponed until the death of the depositor,² the deposit belongs to the assignee and not to the personal representative of the deceased depositor.³ But where the depositor has died owning the deposit, the property of the deceased devolves, as to the personalty, upon the personal representative of the deceased.

¹⁷ *German Nat. Bank v. National State Bank*, 3 Colo. App. 17, and cases cited therein; *Terry v. Sisson*, 125 Mass. 560. In the former case the court retails some interesting morsels of knowledge. If it could have referred to the report of the argument of *Kinnersley v. Knott*, 7 C. B. 980, found at 9 Am. Law Rev. 176, copied from the *Albany Law Journal*, it might have quoted one of the most amusing passages in all legal literature.

¹⁸ *German Nat. Bank v. National State Bank*, *supra*; *Terry v. Sisson*, *supra*.

¹⁹ This follows from the nature of the check.

²⁰ Certifying or accepting a check makes the bank the debtor and releases the drawer; but see note 23, § 134, *ante*.

²¹ The levy gives a lien which is legal, not equitable, which would prevail over any equitable assignment. See the next section.

¹ *Risley v. Phoenix Bank*, 83 N. Y. 318; *Foss v. Lowell Sav. Ass'n*, 111 Mass. 285.

² *Schollmeier v. Schoendelen*, 78 Iowa, 426.

³ *Gammond v. Bowery Sav. Bank*, 15 Daly, 483.

The personalty devolves upon the executor by virtue of the will, upon the administrator by virtue of the law. The death is equivalent to an assignment by operation of law. Even a foreign administrator is entitled to the personalty.⁴ It follows as a matter of necessity that all unaccepted checks outstanding are revoked by the death of the depositor,⁵ except that the bank will be protected as to payments made before notice of the death,⁶ just as it will be protected as to payments made before notice of the assignment.⁷ The word "revoked" hardly expresses the fact; the check is not revoked, but as an order to pay it is not binding upon the bank because the depositor has no longer any funds; the deposit belongs to the personal representative. The idea, therefore, that the death is the revocation of a power given by the check is a total mistake.⁸ The bank, of course, may pay the check or may accept it after the drawer's death, just as the drawee of a bill of exchange may accept or pay it after the drawer's death. But the bank, having paid, could not charge it against the depositor's account. Yet in equity the bank ought to be subrogated to the claim of the payee of the check against the drawer. But this would not be a right arising out of payment of the check as a check, but rather an equitable assignment of the payee's original claim.

⁴ Schluter v. Bowery Sav. Bank, 117 N. Y. 125. But he could not sue except by statute.

⁵ Nat. Com. Bank v. Miller, 77 Ala. 168; Fordred v. Seamen's Sav. Bank, 10 Abb. Pr. (N. S.) 425; Simmons v. Cincinnati Sav. Soc., 31 Ohio St. 457. Even if it be drawn to pay funeral expenses by person *in extremis*. Second Nat. Bank v. Williams, 13 Mich. 282.

⁶ Brennan v. Manuf. Nat. Bank, 62 Mich. 343, *dictum*. See Tate v. Hilbert, 2 Ves. Jr. 111.

⁷ Laclede Bank v. Schuler, 120 U. S. 511.

⁸ Mr. Daniel in 3 Va. Law Jour. 323, puts forward the view that a

check is to the payee a power coupled with an interest and therefore irrevocable. This view betrays a confusion between ownership of the check itself and ownership of the credit in the bank. The two things are wholly distinct. It is enough to say that all the adjudicated law is contrary to this theory. The check may be an authority to receive the money, but it gives no power over or ownership in the deposit. See Gardner v. First Nat. Bank, 10 Mont. 149, where a power to a bank to apply deposit was held not a power coupled with an interest.

So far the law seems reasonably certain, wherever the rule prevails that the holder of a check has no claim upon the bank until acceptance of the check by the bank. But in a few states the rule prevails that the holder of a check gains a right of action at law against the bank if it refuses payment of a check when it has sufficient funds credited to the drawer.⁹ The rule, however, is fixed in these last named states, that if the bank has not funds when the check is presented, even if it had funds when the check was drawn, no liability arises against the bank.¹⁰ It is the presentment of the check that is the inception of the holder's right against the bank.¹¹ If this be true, it follows as a matter of necessity that, in the states spoken of, the death of the drawer compels the bank to refuse payment of any check of the drawer which is for the first time presented after the death of the drawer, or rather notice thereof,¹² because the drawer ceased to own the deposit, and ceased, therefore, to have funds to his credit as soon as he died. His death *ipso facto* transferred the deposit to his personal representative, who, whether appointed by will or by the court, takes title of the date of the death. This result also follows from the proposition that since presentment is necessary to fix any liability upon the bank, a check may be revoked under the Illinois rule at any time before presentment.¹³ If it be kept in mind that

⁹ Illinois, Kentucky, Nebraska, South Carolina, and perhaps Texas, hold the rule. Missouri and Iowa have repudiated it. Louisiana has decisions both ways. See § 147, *post*.

¹⁰ *Bank of Antigo v. Union Trust Co.*, 149 Ill. 343. It is rather singular that Mr. Justice Shope in this case should have written himself down as believing that the payee is the drawee of a check. The bank is the drawee.

¹¹ *Shaffner v. Edgerton*, 13 Bradw. 132; *Lester v. Given*, 8 Bush, 357. The case of *Met. Nat. Bank v.*

Jones, 137 Ill. 634, 643, expressly says that the assignment does not take place until presentment. So *Daniel*, Neg. Inst. (4th ed.), sec. 1639.

¹² The bank has the right to appropriate the deposit on its own claim before presentment. *National Bank v. Blumensweig*, 46 Ill. App. 297.

¹³ *Tramell v. Farmers' Nat. Bank*, 11 Ky. Law R. 900. Except as to a *bona fide* holder, which means one who took it from the payee. *Union Nat. Bank v. Oceana Co. Bank*, 80 Ill. 212; *Marine Co. v. Stanford*, 28

the question is between the bank and the holder of the check, no court ought to experience any difficulty in reaching this conclusion. It may be urged that it is held that a check is a partial assignment;¹⁴ and if equal to the deposit, a total assignment of the deposit;¹⁵ and that as between the drawer and the payee it transfers so much of the fund,¹⁶ which amount passes to each successive holder of the check.¹⁷ But it is apparent that the courts do not use this phrase in its proper sense; (1) because an equitable assignment must have, like every other contract enforced in equity, a valuable consideration. There is no consideration passing from the drawer to the payee, for the reason that, unless the check is expressly taken as payment, it pays nothing.¹⁸ The original claim remains, and can be sued upon even after presentment of the check.¹⁹ It is not payment until it is itself paid.²⁰ If the check is purchased by or discounted to a third party for value, he may become a *bona fide* holder as against the drawer. The check is not an equitable assignment, (2) because, until it is presented, it may be revoked,²¹ which, of course, would not be possible if the check were even an equitable assignment. It is not an equitable assignment proper, (3) because a bank in these states with the abnormal

ILL. 168; *Bickford v. First Nat. Bank*, 42 Ill. 238; *Brown v. Leckie*, 43 Ill. 497.

¹⁴ *Munn v. Birch*, 25 Ill. 35.

¹⁵ *Gardner v. Nat. City Bank*, 39 Ohio St. 600.

¹⁶ *Bank of Antigo v. Union Trust Co.*, 149 Ill. 343, and cases cited therein.

¹⁷ *Merchants' Nat. Bank v. Ritzinger*, 20 Bradw. 27.

¹⁸ *Thompson v. Bank of Brit. No. Am.*, 82 N. Y. 8. Numerous cases could be cited to this proposition.

¹⁹ *Ridgeley Bank v. Patton*, 109 Ill. 479. *Daniel, Neg. Inst.* (4th ed.), sec. 1639, says this, of course, would not be allowed. He seems not to

have known of this case, if he edited that edition personally.

²⁰ *Brown v. Leckie*, 43 Ill. 497, 501, recognizes this rule, and says the checks are not payment but the means of payment. That the holder is the agent of the drawer which precludes him from having the absolute title. See the place last cited. This is said even as to certified checks, and the same rule is held as to certificates of deposit. *Leake v. Brown*, 43 Ill. 372.

²¹ *Tramell v. Farmers' Nat. Bank*, 11 Ky. Law R. 900; and see note 13, *ante*, to this section. Insolvency revokes it before presentation. *National Bank v. City Nat. Bank*, 63 Ill. 398.

theory of a check is not compelled to pay part of a check;²² but if the check were an actual assignment when drawn, it would be good to the extent of the deposit. Finally, presentment and acceptance by the bank of the check are necessary under this rule to release the drawer;²³ but if the check were an actual assignment, the drawer would have paid the claim against him to the amount of the check, and he would be liable only upon his implied representation that he had funds in the bank to the amount of the check. The failure of the bank to pay could not affect him if the bank had funds. Therefore it is only as to one who has taken as a *bona fide* holder the check from the payee that it can be said, under these decisions, that the check is an assignment before presentation. Yet, even if the check were conceded to be an assignment as between the drawer and payee, it confers no legal title, unless it is for the exact amount of the deposit. Being a partial assignment it is merely equitable.²⁴ But to the executor or administrator a legal title passes by the death. As representing the creditors of the deceased, the personal representative has an equity equal to the equity of any other unsecured creditor, which a check-holder is until presentation of the check. So the equities being equal, the legal title will prevail, and that is in the personal representative. He did not become personal representative until the death, and hence as personal representative could have received no notice prior to the very moment that he got the legal title. The same result would follow if the executor or administrator and the check-holder

²² Coates v. Preston, 105 Ill. 470. It does not pass title to any part of the deposit. Pabst Brew. Co. v. Reeves, 42 Ill. App. 154.

²³ Metrop. Bank v. Jones, 137 Ill. 634; Ridgeley Bank v. Patton, 109 Ill. 479.

²⁴ Miller v. Bledsoe, 2 Ill. 530; Stone v. Pratt, 25 Ill. 25. This last case was decided ten pages away from Munn v. Birch, 25 Ill. 35,

which held the check to be an equitable assignment. If the check was an order as an equitable assignment, it conferred no right until presented. Such is the law as to every other assignment, and nowhere is the law more clearly held than in Illinois. See Moore v. Gravelot, 3 Bradw. 442; Creighton v. Hyde Park, 6 Bradw. 272.

are considered as having orders on the fund. The order first communicated to the holder of the fund would confer, as against the bank, the better right.²⁵ We may conclude, then, that in these states the check must be presented before notice of the other assignment by death comes to the bank. No bank, therefore, in these states which we are considering, would be justified in paying a check not presented until after notice of the depositor's death unless, it may be in Illinois, to a *bona fide* transferee.²⁶ The rule is a just and sound one. It can injure no one. If the check-holder has an honest claim he will obtain it by presenting it to the personal representative. If his claim is not honest he ought not to obtain it merely because he has a check. If the estate is solvent, the claim will be paid in full, and the check could be used as evidence of an admission. If it is not solvent the check-holder ought not to obtain a preference. In all other states, and in cases subject to the jurisdiction of the United

²⁵ *Laclede Bank v. Schuler*, 120 U. S. 511, and the cases cited therein. Compare *Moore v. Gravelot*, 3 Bradw. 442; *Creighton v. Hyde Park*, 6 Bradw. 272, which recognize this rule as to orders upon a fund, and those cases seem to be undisputed authority in Illinois.

²⁶ The law unquestionably is in Illinois that as against a *bona fide* holder of a check the bank cannot refuse payment of the check. *Niblack v. Park Nat. Bank*, 169 Ill. 517, and the cases cited in note 18, *supra*. This is the most astonishing result of this weird rule that the holder can sue the bank. Even if the check were a bill of exchange before acceptance, a *bona fide* holder has no rights against the drawee. Yet here is the Illinois court reverting to the rule that a check is an assignment, holding that as against the bank the check

is an assignment before presentation, while it has held over and over again that it is not an assignment until it has been presented, and not even then if the depositor has not the full amount of the check. Then it is held that there is no duty upon the bank to reserve from future payments enough to pay an unrepresented check. *Gilliam v. Merchants' Nat. Bank*, 70 Ill. App. 592. Then the court reverts to its former idea of assignment by the giving of the check, and holds that the check cannot be countermanded before presentation against a *bona fide* holder, so that the bank can refuse to pay. *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531. These cases are another instance of the great confusion caused by this rule. See for further illustrations note 30 to § 147, and note 22 to § 140.

States courts, which in a matter of general commercial law would not follow the state decisions, a bank would not be justified in paying, after notice of the depositor's death, any check but a certified or accepted one. For if the bank in either case pays the check, the personal representative may, after demand, sue the bank. At law the bank would have no defense, although in equity it would, no doubt, be subrogated to the payee's original claim.

§ 139. Insolvency of depositor.—The effect of an assignment for the benefit of creditors by the depositor is to transfer the deposit as any assignment would transfer it. The right of the bank to appropriate the depositor's account will be considered in the next section. Whatever the bank pays before notice of the assignment will be, of course, a good payment.¹ Where statutory systems of insolvency prevail that would invalidate preferences secured prior to an application in bankruptcy, it would appear to be a reasonable rule that the bank's payments of checks would be good up to the time of receiving notice of the application in bankruptcy,² unless the statute should provide that any transfer by the insolvent after an act of bankruptcy was forbidden.³ In the latter case the bank ought to refuse to pay unaccepted checks as soon as it receives any notice of an act of bankruptcy, unless in those states where the holder can sue, where the bank could not safely refuse to pay if the check had been presented, nor can it safely refuse even then, because the United States courts will refuse to recognize the rule.⁴ There

¹ *Laclede Bank v. Schuler*, 120 U. S. 511.

² Under the new bankruptcy law of the United States a fraudulent conveyance, or a written recognition of insolvency, or an application, or an assignment for creditors, are all acts of bankruptcy, and it is very questionable if the bank ought not to refuse unaccepted, or in some states unrepresented, checks, after notice of an act of bankruptcy.

But even in the states which recognize the presentment of the check as giving the right to sue, the United States courts in bankruptcy must refuse to recognize the state rule.

³ The English statute, 12 and 13 Vict., ch. 106, § 133, so provides.

⁴ See the last section for those states, note 9. *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398. But *Chambers v. Northern Bank*, 5 Ky. Law R. 123, holds that the drawing

are a number of statutes against preferences whose effect is to render an assignment of a deposit, after the depositor has become insolvent, void.⁵ Therefore, a bank in such states could not recognize an assignment after notice of insolvency, and ought not to recognize an unaccepted check, or in a few states possibly an unpresented check; but even if the check be presented, the trustee of the bankrupt can recover the payment in the United States court.

§ 140. Bank applying deposit to its own claim.—It is a recognized principle in banking law that a bank has the right to apply the general deposit of the depositor to the payment of the bank's unsecured claims against the depositor. The nature of the claim of the bank may be either a matured or an unmatured debt, an unliquidated claim for damages, and even a right to recover for a fraud, and the rights of the bank vary somewhat in the cases with the nature of the claim. But one rule is unvarying — the claim must be really and in fact the property of the bank,¹ and in the next place the deposit must legally and equitably belong to the depositor.² Even though the bank has no notice that the deposit belongs to some one else than the depositor, it cannot appropriate the deposit for a debt of the ostensible depositor, unless it has been misled, or has suffered an injury or given credit upon the strength of the apparent ownership,³ and then

of the check prevails over the petition in bankruptcy, which does not revoke check even if the bank had notice.

⁵ *Stone v. Dodge*, 96 Mich. 514; *Van Dyke v. McQuade*, 85 N. Y. 616; *In re Hamilton*, 26 Oreg. 579. *Contra*, *Moseby v. Williamson*, 5 Heisk. 278. And compare *Johnston v. Humphrey*, 91 Wis. 76. This rule applies to national banks. *Venango Nat. Bank v. Taylor*, 56 Pa. 14. A different provision is noticed in *Bank of Pennsylvania v. Spangler*, 32 Pa. 474.

¹ *Stetson v. Exchange Bank*, 7 Gray, 425.

² *Lawrence v. Bank of Republic*, 35 N. Y. 320; *Tobey v. Manufacturers' Nat. Bank*, 9 R. I. 236; *National Bank v. Insurance Co.*, 104 U. S. 54; *Walker v. Manhattan Bank*, 25 Fed. R. 247; *Union Stock Yards Bank v. Gillespie*, 137 U. S. 411; *Clemmer v. National Bank*, 157 Ill. 206; *Coote v. Bank of United States*, 3 Cranch, C. C. 95.

³ *Douglas v. First Nat. Bank*, 17 Minn. 35; *Armstrong v. National Bank*, 53 Iowa, 752; *Anderson v.*

only to the extent to which it has suffered injury. But if the bank has a claim against the true owner of the deposit, it may apply the deposit though standing in another name.⁴ It makes no difference how the claim arises, whether it be against the depositor alone or against himself and wife,⁵ or against him as indorser or guarantor of a matured note, provided the maker or principal debtor is insolvent.⁶ But if the debt is fully secured the bank may not apply the deposit,⁷ unless there be a special agreement to that effect. If the unsecured debt be matured there is no doubt of the bank's right to make the application.⁸ It is said to be the law by a number of decisions that are not able to give any reasonable excuse for their existence, that the bank cannot apply the deposit of the individual depositor upon the debt of the firm of which he is a member;⁹ but the better view of the

Market Nat. Bank, 1 N. Y. Supp. 136; *Davis v. Panhandle Nat. Bank*, 29 S. W. R. 926; *Wood v. Boylston Bank*, 129 Mass. 358; *Cady v. South Omaha Nat. Bank*, 46 Neb. 756. *Contra*, *Boettcher v. Colorado Nat. Bank*, 15 Colo. 16. Compare *Burnett v. National Bank*, 38 Mich. 430.

⁴ *Garnett Bank v. Bowen*, 21 Kan. 354; *Falkland v. National Bank*, 84 N. Y. 145. See also *Hatch v. Fourth Nat. Bank*, 147 N. Y. 184. *Contra*, *Citizens' Bank v. Alexander*, 120 Pa. 476.

⁵ *Haydon v. Alton Nat. Bank*, 29 Ill. App. 458. But it is held that if a note is joint and several the bank cannot apply the deposit of one maker. *Merchants' Bank v. Evans*, 9 W. Va. 373; *Dawson v. Real Estate Bank*, 5 Ark. 283; *Long Island Bank v. Townsend*, Hill & D. Supp. 204. These cases are not sound. See note 9, *infra*.

⁶ *Ex parte Howard Nat. Bank*, 2 Low. 487. *Contra*, *National Bank v. Proctor*, 98 Ill. 558, as to note not

due. Compare *Appeal of Farmers' Bank*, 48 Pa. 57; *National Bank v. Gormley*, 2 Walk. (Pa.) 493; *Newbold v. Patrick*, 25 Pitts. Leg. J. (N. S.) 299. But *Mechanics' Bank v. Seitz*, 150 Pa. 632, seems to be in accord, while *First Nat. Bank v. Shreiner*, 110 Pa. 188, denies the right as to a guarantor, but not an indorser.

⁷ *Schuler v. Israel*, 120 U. S. 506; *Farmers' Bank v. McFerran*, 11 Ky. Law R. 183.

⁸ See cases in preceding notes and *Commercial Bank v. Hughes*, 17 Wend. 94; *Blair v. Allen*, 3 Dill. 101; *National Bank v. Hill*, 76 Ind. 223. The application is to be made on the last day of grace. *Home Nat. Bank v. Newton*, 8 Ill. App. 563.

⁹ *Watts v. Christie*, 11 Beav. 546; *International Bank v. Jones*, 119 Ill. 407; *Raymond v. Palmer*, 41 La. Ann. 425; *Adams v. National Bank*, 113 N. C. 332. See note 5, *supra*.

law is that it can.¹⁰ If the unsecured debt is not matured, the great weight of authority and the reason of the rule of equitable set-off permits the application of the deposit, provided the depositor be insolvent.¹¹ But death is not equivalent to insolvency; yet if the depositor died insolvent¹² the application can of course be made to unmatured and unsecured indebtedness.¹³ In Pennsylvania, if the debtor dies insolvent, there is no set-off, but if he died solvent his deposit may be set off.¹⁴ The reason for the rule stated above is that the bank has a lien superior to all other claims.¹⁵ This is simply a general business usage crystallized into a rule of law. But some courts wrongly deny the right to apply upon an unmatured indebtedness as against an attachment¹⁶ or against an assignment.¹⁷ Unliquidated demands may be set off against the deposit,¹⁸ and so may a claim to recover for fraud.¹⁹ The fact that checks are outstanding does not deprive the bank of its right;²⁰ but in those states which recognize the right of the holder to sue upon the check after

¹⁰ *Eyrich v. State Bank*, 67 Miss. 60.

¹¹ *Schuler v. Israel*, 120 U. S. 506; *Demmon v. Boylston Bank*, 5 Cush. 194; *Georgia Seed Co. v. Talmage*, 96 Ga. 254; *Fidelity Co. v. Merchants' Nat. Bank*, 9 L. R. A. 108, and note; *Flour Co. v. Merchants' Bank*, 90 Ky. 225; *Trust Co. v. National Bank*, 91 Tenn. 336; *Citizens' Bank v. Kendrick*, 92 Tenn. 437. But *contra*, *National Bank v. Proctor*, 98 Ill. 558. This last decision is incomprehensible.

¹² *Jordan v. National Bank*, 74 N. Y. 467.

¹³ *Ford v. Thornton*, 3 Leigh, 753; *Knecht v. Savings Inst.*, 2 Mo. App. 563.

¹⁴ *Farmers' Bank Appeal*, 48 Pa. 57; *Bosler v. Exchange Bank*, 4 Pa. 32; *National Bank v. Shoemaker*, 11 Wkly. Notes Cas. 215.

¹⁵ *Ford v. Thornton*, 3 Leigh, 695.

¹⁶ *Manufacturers' Nat. Bank v. Jones*, 2 Penny. 377. *Contra*, *Schuler v. Israel*, 120 U. S. 506.

¹⁷ *Oatman v. Batavian Bank*, 77 Wis. 501. This is one of the most absurd opinions in all the books. The court says counsel, in his brief, cites certain cases, and then the court puts those cases in the opinion. There are ten cases cited, but only one is in point, and that is *Beckwith v. Union Bank*, 9 N. Y. 211, which is no longer authority.

¹⁸ *Ex parte Howard Nat. Bank*, 2 Low. 487. *Contra*, *Irvine v. Dean*, 93 Tenn. 346.

¹⁹ *Andrews v. Artisans' Bank*, 26 N. Y. 298. For set-off in peculiar cases, see *Clark v. Northampton Bank*, 160 Mass. 26; *National Bank v. Greene*, 45 N. J. Eq. 546.

²⁰ *Georgia Seed Co. v. Talmage*, 96 Ga. 254.

presentation, no set-off exists in favor of the bank as against a *bona fide* holder of the check;²¹ and in other states it is held that the right of set-off does not exist as against *bona fide* check-holders, whether the bank's claim is matured or unmatured.²² There is no soundness in either rule. The bank may apply the deposit upon any of the depositor's debts of its own that it pleases;²³ but if it has received a deposit under a specific direction or agreement as to its disposition, it will be bound by the direction or agreement,²⁴ and this direction need not be in writing.²⁵ The application of a general deposit, if applied without notice of a valid adverse claim, can be justified in certain cases.²⁶ Collections made and properly credited are deposits, when mingled with the funds of the bank, and are applicable by the bank as deposits.²⁷

§ 141. Duty of bank to apply deposit.—It is a well-known principle of law that any dealing between the creditor and the principal debtor—and one case holds any concealment of a relation between the creditor and the principal debtor¹—prejudicial to the indorser or guarantor of the contract, without the assent or concurrence of the surety, releases the latter. The bank having a lien upon

²¹ Fourth Nat. Bank v. City Bank, 68 Ill. 398; Merchants' Nat. Bank v. Ritzinger, 20 Ill. App. 27.

²² Fidelity Trust Co. v. Merchants' Bank (Ky.), 9 L. R. A. 108; Zeile v. German Sav. Inst., 4 Mo. App. 401, which latter case is no longer an authority. The Illinois cases are express that as against a *bona fide* check-holder the bank must have applied the deposit before presentation of the check. Niblack v. Park Nat. Bank, 169 Ill. 517. This ruling is of course wrong, because it gives the check-holder a better right than the drawer of the check; it is simply another illustration of the wild result of the rule that says a check is an assignment.

²³ Commercial Nat. Bank v. Henninger, 105 Pa. 496.

²⁴ Straus v. Tradesmen's Bank, 36 Hun, 451, 122 N. Y. 379; United States Bank v. Macalister, 9 Pa. 475; Packing Co. v. First Nat. Bank, 69 Miss. 700.

²⁵ Case last cited.

²⁶ McEwen v. Davis, 39 Ind. 109; Allen v. Brown, 39 Iowa, 330; note 3 to this section.

²⁷ Muench v. Valley Bank, 11 Mo. App. 144.

¹ Jungk v. Reed, 8 Utah, 49. The author reported this case, and then thought, and still thinks, it wrongly decided upon the whole issue.

the deposit for its claims, and having the opportunity to protect the surety, ought in justice to do so. The situation of the surety is certainly altered to his disadvantage, unless he assents. But some courts admit this right in the surety,² while other deny it.³ The courts of Pennsylvania have become involved in a singular net of conflicting *dicta* and decisions upon this question.⁴ The cases will be found in the note. The duty, however, does not exist as regards the acceptor of a bill of exchange, whether the deposit exists at the date of the maturity of the bill⁵ or is deposited afterwards.⁶ Wherever there is an agreement taking a particular security out of the course of general dealing between the bank and the depositor, the surety cannot complain that his rights are prejudiced.⁷ But it will be seen that the same result is achieved where a deposit exists, in a few cases, by

² Dawson v. Real Estate Bank, 5 Ark. 283; German Nat. Bank v. Foreman, 138 Pa. 474; Mechanics' Bank v. Seitz, 150 Pa. 632; McDowell v. Wilmington Bank, 1 Harr. 369; Pursifall v. Pineville Bank, 30 S. W. R. 203; Faulkner v. Cumberland Valley Bank, 14 Ky. Law R. 923; Armstrong v. Warner, 49 Ohio St. 376. This latter case holds that the surety upon a note on the insolvency of the bank is entitled to the principal's deposit as a set-off against the note.

³ Wilson v. Dawson, 52 Ind. 513; Voss v. Germ. Am. Bank, 83 Ill. 599; Third Nat. Bank v. Harrison, 10 Fed. R. 243; Teconic Bank v. Johnson, 21 Me. 426; National Bank v. Smith, 66 N. Y. 271; and see the Pennsylvania cases in the next note.

⁴ People's Bank v. Legrand, 103 Pa. 309, held if deposit insufficient it need not be applied, but gave indorser maker's right of set-off. First Nat. Bank v. Shreiner, 110 Pa. 188,

held that subsequent deposits, if insufficient, need not be applied; but Commercial Bank v. Henninger, 105 Pa. 496, and Germ. Nat. Bank v. Foreman, 138 Pa. 474, held that if the deposit was sufficient at the date of the maturity of the bill, it must be applied. But Mechanics' Bank v. Seitz, 150 Pa. 632, and First Nat. Bank v. Peltz, 176 Pa. 513, decide that the deposit must be sufficient at the maturity of the debt, and must be to the credit of the person primarily liable. It may be possible to induce some other court to accept these distinctions.

⁵ Flournoy v. National Bank, 79 Ga. 810.

⁶ Citizens' Nat. Bank v. Carson, 32 Mo. 191.

⁷ Mahaiwe Bank v. Peck, 127 Mass. 298; but Germ. Nat. Bank v. Foreman, 138 Pa. 474, denies the rule where the deposit remains a general deposit. See Wilson v. Dawson, 52 Ind. 513.

giving to the surety, where the drawer is insolvent, a set-off based upon his apparent subrogation to the rights of the depositor as they existed, presumably, at the date of the maturity of the claim.³

§ 142. Right of bank to apply deposit on other demands.—If a note be made payable at a bank, it has been said, without good reason, that the bank has no authority to pay it out of the maker's deposit without a direction to do so.¹ But this rule is subject to the qualification, in those states which hold it, that if there is a custom to that effect known to the maker the bank may do so.² If the deposit is made for the purpose of paying a particular note, the bank may so apply, unless before payment it is notified not to do so.³ As we have seen, such a deposit does not become necessarily the property of the person for payment of whose note it is deposited.⁴ A certification of a note payable at the bank is the same as the certification of a check.⁵ If payment be made of such a note by the bank, even though the

³ *Armstrong v. Warner*, 49 Ohio St. 376; *Van Wenke Gin Co. v. Citizens' Bank*, 89 Tex. 147. The last case is clearly wrong; the drawer was not insolvent. It practically holds that non-residence is equivalent to insolvency where the acceptor seeks to hold the bank for non-application of the drawer's deposit. See notes 5 and 6, *supra*.

¹ *Wood v. Merch. Trust Co.*, 41 Ill. 267; *Ridgely Nat. Bank v. Patton*, 109 Ill. 479. The case of *Home Nat. Bank v. Newton*, 8 Bradw. 563, does not establish a different rule in Illinois. It is considered at 1 Daniel, Neg. Inst. 326*a*, as doing so, but that is a total mistake, because the note in question was to the bank itself. *Grissom v. Comm. Nat. Bank*, 87 Tenn. 350. But the better rule is that it can. *Riverside Bank v. First Nat. Bank*, 74 Fed. R. 276 (an

able court); *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 88; *Indig v. Bank*, 80 N. Y. 100; *Griffin v. Rice*, 1 Hilt. 184; *Frances v. People's Bank*, 1 Ohio N. P. 281. But if the bank pays, it may set the note off against the deposit. *Bedford Bank v. Acoam*, 125 Ind. 584; but *Grissom v. Comm. Nat. Bank*, 87 Tenn. 350, is *contra*. See § 173, *post*.

² *Grissom v. Comm. Nat. Bank*, 87 Tenn. 350. But this is a general usage that every sane person ought to be held to know.

³ *Bedford Bank v. Acoam*, 125 Ind. 584.

⁴ *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82. And see note 15 to § 136, *ante*.

⁵ *Riverside Bank v. First Nat. Bank*, 74 Fed. R. 276, and cases therein cited.

bank acted under a clear mistake as to the state of the depositor's account, it is final.⁶ But payment through a clearing-house is provisional only, and may be rescinded on the ground of mistake.⁷

§ 143. Payment by the bank of deposit.—The duty of the bank to its depositor is in some way to make payment. We have indicated certain methods by which this is done, as, for instance, by payment to the true owner, by payment to the assignee, by payment to the depositor's creditor under legal process, by payment to the personal representative, by payment to itself in discharge of its own claims, and by payment upon other claims payable at the bank. But there are other methods of paying, such as by remittances, and finally by payments upon checks. A remittance to a distance is said to be at the risk of the depositor.¹ Generally the depositor gives his own check to the bank, and the bank remits the amount, or he simply deposits a sum to be transferred, getting a draft. In either case, at whose risk is the transfer? is a vexed question. But it would seem that if the bank itself undertakes to remit it must bear the loss,² but if the remitter purchases a draft upon the other bank which he himself sends, the draft is not payment until it is paid itself.³ Com-

⁶ *Riverside Bank v. First Nat. Bank, supra*, and cases therein cited.

⁷ *Nat. Ex. Bank v. National Bank of North America*, 133 Mass. 147. But see § 158, *post*.

¹ *Jung v. Second Ward Sav. Bank*, 55 Wis. 364. This case seems to be the only known instance where a court was so deluded as to hold that payment to a forger upon a forged indorsement was actual payment of the deposit where the depositor was not to blame. The court cited as its authority *Graves v. Am. Ex. Bank*, 17 N. Y. 205, which exactly contradicts the opinion.

² *Cutler v. Am. Ex. Nat. Bank*, 113 N. Y. 593. See *Weedsport Bank v. Park Bank*, 41 N. Y. 561. The point is as to when the transaction is complete so that the funds are really transmitted and put to the credit either of the transmitter or the person designated by him.

³ But this proposition is denied in *Ex parte Jones*, 77 Ala. 330, to the extent that the depositor having taken a draft ceases to be a depositor, and if the draft is not paid cannot rescind and claim to be a depositor. But if the bank had been guilty of a fraud, the rule would be different. Compare *Hogue v. Edwards*, 9 Bradw. 148,

ing now to the payment by the bank itself through the medium of checks, the engagement of the bank to its depositor is to pay the deposit, if it is not a time deposit, upon demand,⁴ and there can be no default until a demand is made.⁵ A check upon the bank duly presented is a demand.⁶ The bank can only refuse to pay the deposit (1) when it has not sufficient credit to the drawer to pay the whole check;⁷ (2) when it has notice of the fact that the deposit does not belong to the drawer;⁸ (3) when it is put upon inquiry as to the fact that funds deposited, but known to the bank to be trust funds, either by the form of the deposit or in some other way, are being misappropriated;⁹ but a deposit deposited by the trustee to himself as trustee must be paid out on the check of the trustee;¹⁰ and if the deposit is to the credit of some one as agent, and the bank knows or ought to know who is principal, it cannot pay on the check of the agent;¹¹ but it is said if nothing appears as to the principal the bank may pay on the check of the agent;¹² (4) when it has notice of an assignment or has accepted or certified checks to the

263. This case is a very peculiar one. The holder of a check obtained a draft for his check, which was payable in exchange. A remedy was refused the holder under the Illinois rule because the check was not payable in money. But the court recognizes that the checkholder still has a claim upon the drawer of the check. See note 30, § 147, *post*.

⁴ Ward v. Johnson, 95 Ill. 215.

⁵ Girard Bank v. Bank of Penn Township, 39 Pa. 92.

⁶ But it is not the only form of a demand. Citizens' Bank v. Harrison, 127 Ind. 128.

⁷ Coates v. Preston, 105 Ill. 470; Pabst Brewing Co. v. Reeves, 42 Ill. App. 154. *Contra*, Bromley v. Comm. Nat. Bank, 9 Phila. 522. But the bank may agree to pay *pro tanto*.

Dana v. Third Nat. Bank, 95 Mass. 445.

⁸ See § 134, *ante*.

⁹ See §§ 135, 136, *ante*.

¹⁰ Ihl v. St. Joseph Bank, 26 Mo. App. 129. But see Munnerlyn v. Augusta Bank, 88 Ga. 333. But bank is bound if it has agreed to apply trust money to individual debt of the trustee. Sayre v. Weil, 94 Ala. 466. See § 135, *ante*, note 14.

¹¹ See § 135, *ante*, notes 8 and 9.

¹² Patterson v. Marine Bank, 130 Pa. 419; Citizens' Bank v. Alexander, 120 Pa. 476; Lockhaven Bank v. Mason, 95 Pa. 113; German Bank v. Himstedt, 42 Ark. 62. The language, but not the actual decision, in Honig v. Pacific Bank, 73 Cal. 464, is *contra*. And see § 135, note 8, *ante*, which states the better rule.

amount of the deposit;¹³ (5) when it has notice of a lien upon the deposit;¹⁴ (6) when it has notice of the death of the depositor;¹⁵ (7) when it has notice of the insolvency of the depositor;¹⁶ (8) when it has itself appropriated or has a valid lien upon the deposit for a claim paid to itself or to some one else.¹⁷ The above cases constitute the exceptions to the necessity for payment by the bank when it has funds to the credit of the depositor. Otherwise the bank is estopped to dispute its depositor's title,¹⁸ nor can it set up any illegality in the method by which the depositor acquired the moneys deposited.¹⁹ Where the bank, however, has notice of an adverse claim, it may exact indemnity as a condition of paying the check.²⁰ If there are separate accounts the bank must regard these separate funds.²¹ The fact that the original deposit was in notes taken as cash, which have depreciated in value, makes no difference, though there be a custom to the contrary; the bank must bear the loss in the case of a general deposit.²² It must pay the check in current funds,²³ but if the money has been confiscated by the government it has

¹³ See § 146, notes 14 and 15, and § 150. The certification takes so much money from the depositor's account. It is an assignment to the bank.

¹⁴ See § 137, *ante*.

¹⁵ See § 138, *ante*.

¹⁶ See § 139, *ante*.

¹⁷ See §§ 140, 141, *ante*.

¹⁸ *Citizens' Bank v. Alexander*, 120 Pa. 476; *Martin v. Minnekahta Bank*, 7 S. D. 263.

¹⁹ *Porter v. Sher. Co. B'g Co.*, 40 Neb. 274.

²⁰ *Starr v. York Nat. Bank*, 55 Pa. 364.

²¹ *Voight v. Lewis*, Fed. Cas. No. 16,989.

²² *Marine Bank v. Chandler*, 27 Ill. 525. See *Chicago Marine Co. v. Carpenter*, 28 Ill. 360; *Osgood v. McConnel*, 32 Ill. 74; *Willets v.*

Paine, 43 Ill. 432. But payment in treasury notes is good where the state law requires the deposit to be paid in gold and silver. *Reynolds v. Bank of State*, 18 Ind. 467. The legal tender cases affirmed this ruling. Custom cannot prescribe a legal tender different from that fixed by law. *Thompson v. Riggs*, 5 Wall. 663; *Marine Bank v. Chandler*, 27 Ill. 525. General deposits are payable in current funds. *Gumbel v. Abrams*, 20 La. Ann. 568; *Fort v. Bank of Cape Fear*, 61 N. C. 417; *Ruffin v. Orange Co. Comm'rs*, 69 N. C. 498. Deposit of Confederate notes not a deposit of money. *Foster v. Bank of New Orleans*, 21 La. Ann. 338. *Contra*, *Dabney v. Bank of State*, 3 S. C. 124, as to the value deposited.

²³ *Marine B'k v. Chandler*, 27 Ill. 525.

been held that the depositor bears the loss.²⁴ This decision is correct in case of a special deposit, but wholly wrong as to a general deposit, which creates the relation of debtor and creditor. Just as the bank must bear the loss where the deposit was in money which afterwards depreciated, it obtains the benefit if the money deposited taken at its real value increases in value.²⁵ But an agreement to return in kind the deposit makes the deposit special,²⁶ and evidence of usage is admissible to show that a certain entry in the books purported to be such an agreement.²⁷ Whatever payments the bank makes upon checks is payment of the deposit *pro tanto*.²⁸ Outstanding checks cannot excuse the bank's failure to pay.²⁹

§ 144. Liability to depositor for set-off.—The right of set-off between the bank and its depositor is reciprocal. The depositor has a right of set-off against the bank for his deposit against the bank's claim,¹ or for any other direct and ascertained claim which constitutes a set-off.² But an unaccepted check in his favor, drawn by another depositor, would not be a claim that could be set off,³ except, perhaps, in those states which allow the holder of a check to sue the bank, and in that case only after the check has been presented.⁴ If the bank is insolvent, the depositor or an indorser upon a note held by the bank may set off his individual deposit in

²⁴ *Mandeville v. State Bank*, 19 La. Ann. 392.

²⁵ *Gumbel v. Abrams*, 20 La. Ann. 568.

²⁶ *Chesapeake Bank v. Swain*, 29 Md. 483.

²⁷ Case last cited.

²⁸ *Mayer v. Heidelberg*, 123 N. Y. 332.

²⁹ *Meridian Nat. Bank v. Hauser*, 145 Ind. 496; *Jackson Ins. Co. v. Cross*, 9 Heisk. 283. Unless, of course, they are accepted or certified, and in some states unless they have been presented. See § 147, *post*.

¹ *Whittington v. Farmers' Bank*,

5 Har. & J. 489; *Equitable Bank v. Claasen*, 23 N. Y. Supp. 310.

² *Whittington v. Farmers' Bank*, 5 Har. & J. 489.

³ *Butterworth v. Peck*, 5 Bosw. 341.

But in those states which recognize the holder's right to sue the bank, it would logically follow that the check after presentation could be set off after insolvency. This would make it a simple process to wipe out the bank's assets against solvent debtors.

⁴ See the last note. Surely those states would hesitate before making such a ruling.

the bank, although the note matured after the insolvency.⁵ If the note was due at insolvency, all authority concedes the right.⁶ This right of set-off is not lost by the appointment of a receiver⁷ or an assignee;⁸ for such an assignee or receiver obtains only the bank's right, no more. It is said that where a director has been sued by the bank or its representative for securities which were transferred to him by the bank in the way of an illegal preference, he may set off his deposit to the extent of dividends he would have received upon his deposit in settlement of the bank's affairs.⁹ In another case an insolvent bank indorsed defendant's note to another bank after maturity. The second bank did not claim to be a *bona fide* holder. The ruling was that the defendant could set off his deposit in the first bank against the note sued upon by the second bank.¹⁰ The ruling would necessarily have been different if the plaintiff had been a *bona fide* holder.¹¹ But where a bank agrees to hold a note for a surety upon the surety's agreement that he will not reduce his deposit below the note, the note belongs to the depositor and the bank is a mere trustee and cannot sue the surety.¹²

⁵ *Schuler v. Israel*, 120 U. S. 506; *Munger v. Albany Nat. Bank*, 85 Jordan v. Sharlock, 84 Pa. 366; *N. Y. 580*, is also *contra*, but the case is correct on other grounds. See also § 330, *post*.

⁶ *State v. Brobston*, 94 Ga. 95, where state had a lien upon the funds of the bank; *Batty v. Scuddy*, 10 La. Ann. 404; *In re Van Allen*, 37 Barb. 225; *Seymour v. Dunham*, 24 Hun, 93.

⁷ *Yardley v. Clothier*, 49 Fed. R. 337; *Miller v. Franklin Bank*, 1 Paige, 444.

⁸ *Fort v. McCulley*, 59 Barb. 87.

⁹ *Lamb v. Pannell*, 28 W. Va. 663.

¹⁰ *Merchants' Ex. Bank v. Fieldner*, 92 Wis. 415.

¹¹ *Philler v. Woodfall*, 32 Wkly. Notes Cas. 183.

¹² *Harrison v. Harrison*, 118 Ind. 179.

⁸ *Fort v. McCulley*, 59 Barb. 87.
⁹ *Lamb v. Pannell*, 28 W. Va. 663.
¹⁰ *Merchants' Ex. Bank v. Fieldner*, 92 Wis. 415.
¹¹ *Philler v. Woodfall*, 32 Wkly. Notes Cas. 183.
¹² *Harrison v. Harrison*, 118 Ind. 179.

Certificates of deposit are governed by the same rule as other general deposits as to a depositor's right to set off.¹³ This right if waived is ended,¹⁴ and cannot be revived by a bill in equity.¹⁵

§ 145. **Liability to drawer for dishonoring check.**—As to the drawer, where a bank dishonors his check while funds are deposited to his credit sufficient to meet the check, the remedy is twofold. He may immediately sue for the deposit,¹ because the check is a demand,² or he may sue for damages. The fact of dishonor is to be determined by the true state of the account,³ not what the books show necessarily, although they may be considered as *prima facie* correct as entries made in due course of business.⁴ The depositor when suing for his deposit does not sue upon his check—that is a mere order;⁵ but it is proof of a demand if it was indorsed by the payee.⁶ But this remedy will generally be considered insufficient by the depositor whose check has been dishonored, because the smaller the check the worse is the injury.⁷ The common action, therefore, is an action on the case for damages. It has been pointed out in the introduction how this remedy exists in favor of this particular creditor against his debtor, when it does not exist in favor of other creditors against their debtors. It is really a survival of the day when a deposit in a bank was a bailment, and is the old common-

¹³ *Newberry v. Trowbridge*, 13 Mich. 263.

¹⁴ *In re Commercial Bank*, 4 Ohio Dec. 108.

¹⁵ *Bung Co. v. Armstrong*, 34 Fed. R. 94.

¹ *First Nat. Bank v. Shoemaker*, 117 Pa. 94. The reading of this case reminds one of the artless statement of the reporter in Year Book 30-31 Edw. I.: "*Defaute de bon serjant fet B perdre sez deniers*," quoted 1 Poll. & Mait. Hist. Eng. Law, 199; *Viets v. Union Nat. Bank*, 101 N. Y. 563.

² *Viets v. Union Nat. Bank*, 101 N. Y. 563.

³ See cases cited in notes 17, 18, 19 and 20 to this section.

⁴ This is the general rule applicable to all transactions.

⁵ *First Nat. Bank v. Shoemaker*, 117 Pa. 94.

⁶ *Rowley v. National Bank*, 63 Hun, 550. But this allegation is dispensed with if bank refuses to pay for lack of funds. *Eichner v. Bowery Bank*, 45 N. Y. Supp. 68.

⁷ *Marzetti v. Williams*, 1 B. & Ad. 415.

law action of the bailor against his bailee. It is proven by the fact that the depositor in this action can recover both his deposit and the other damages he has suffered. In this action reasonable and "temperate" damages,⁸ and what that phrase means depends wholly upon the taste and fancy of the particular court, may be recovered without any proof of special damage or of malice.⁹ Other courts say substantial damages may be recovered without such proof.¹⁰ These damages need not be immediately connected with a tangible pecuniary loss.¹¹ But it was held that where the error was discovered and the check paid within a few days, only nominal damages could be recovered.¹² This ruling can be justified only on the maxim *humanum est errare*, because the damages are not necessarily diminished by a rectification of the mistake. But damages, such as for the arrest of the drawer,¹³ or the seizure of his business,¹⁴ are too remote. It is a complete defense to the action that the check was not indorsed by the payee.¹⁵ The fact that in some states the holder has a right of action on the check is no defense¹⁶ in those particular states. It is no defense that the dishonor was caused by negligence of the bank's employee,¹⁷ but would the con-

⁸ *Atlantic Nat. Bank v. Davis*, 96 Ga. 334; *Rolin v. Steward*, 14 C. B. 595. ¹² See *Brooke v. Tradesmen's Bank*, 69 Hun, 202.

⁹ *Schaffner v. Ehrman*, 37 Ill. App. 340, 139 Ill. 109; *Rolin v. Steward*, 14 C. B. 595.

¹⁰ *Schaffner v. Ehrman*, 37 Ill. App. 340, 139 Ill. 109; *Svendsen v. State Bank*, 64 Minn. 40; *Patterson v. Marine Bank*, 130 Pa. 419; *Birchell v. Third Nat. Bank*, 15 Wkly. Notes Cas. 174.

¹¹ *Patterson v. Marine Bank*, 130 Pa. 419 (but should be the reasonable and probable consequences); *Svendsen v. State Bank*, 64 Minn. 40. *Contra*, nominal damages only, *Brooke v. Tradesmen's Bank*, 69 Hun, 202; *Burroughs v. Tradesmen's Bank*, 87 Hun, 6.

¹³ *Bank of Commerce v. Goos*, 39 Neb. 437. The court in this case excluded such evidence, but the plaintiff's attorney, in his desire to swell the damages, got the evidence improperly before the jury and then lost his judgment. But the opinion on this latter point is quite weak.

¹⁴ *Brooke v. Tradesmen's Nat. Bank*, 69 Hun, 202.

¹⁵ *Rowley v. National Bank*, 63 Hun, 550. But see note 6, *supra*, where this proof is dispensed with.

¹⁶ *National Bank v. Boles*, 12 Ky. Law R. 422.

¹⁷ *Atlanta Nat. Bank v. Davis*, 96 Ga. 334.

tributory negligence of the plaintiff be a defense?¹⁸ The fact that it has credited checks on itself as cash which were not good is no defense, but it would be a defense if the checks were on another bank.¹⁹ If a purchased draft, which has been credited as cash, has been lost in going through the mail, and the bank has charged off the draft on account of the drawer's and indorser's failure to furnish another draft, it will be no defense.²⁰ Payment of the check on a forged indorsement will be no defense.²¹

§ 146. Liability of bank to holder.—Since the check is a mere order on the banker, the holder acquires no right against the bank until the check has been accepted or certified by the bank. Certification is, of course, an acceptance, but it is not the only method of accepting a check. Acceptance is a question of fact,¹ and is provable by circumstantial as well as by direct evidence.² An unexplained delay in refusing payment may be an acceptance by the bank.³ An oral statement or telegram⁴ by the cashier,⁵ or by the teller,⁵ that the check is good, either as to drawer or indorser, is an acceptance.⁶ But payment to the wrong person on an unauthorized indorsement does not give the holder of the

¹⁸ Since it is not a suit for negligence the answer ought to be no.

¹⁹ *Am. Ex. Nat. Bank v. Gregg*, 138 Ill. 596, reversing 37 Ill. App. 425.

²⁰ *Kavanagh v. Farmers' Bank*, 59 Mo. App. 540.

²¹ *Citizens' Nat. Bank v. Imp. & Trad. Nat. Bank*, 119 N. Y. 195; *Viets v. Union Nat. Bank*, 101 N. Y. 563.

¹ *First Nat. Bank v. McMichael*, 106 Pa. 460.

² See the case next cited.

³ *First Nat. Bank v. McMichael*, 106 Pa. 460. *Contra*, *Colo. Nat. Bank v. Boettcher*, 5 Colo. 185. Compare *Overman v. Bank*, 31 N. J. Law, 563.

⁴ *Henrietta Nat. Bank v. State Nat. Bank*, 80 Tex. 648; *Espy v. Bank*, 18 Wall. 605. *Contra*, *Myers v. Union Nat. Bank*, 27 Ill. App. 254. And see note 13, § 150, *post*.

⁵ *Barnet v. Smith*, 30 N. H. 256. *Contra*, *Kahn v. Walton*, 46 Ohio St. 195.

⁵ *State v. Morton*, 27 Vt. 310.

⁶ See also, as to oral acceptance, *Farmers' Bank v. Dunbar*, 32 Neb. 487, and *Morse v. Mass. Nat. Bank*, 1 Holmes, 209. But if the statute requires a writing, the rule is different. *Duncan v. Berlin*, 60 N. Y. 151; *State Bank v. Lindeman*, 161 Pa. 199.

check the right to sue the bank as on an acceptance;⁷ yet, if the drawer is allowed credit for the check after wrongful payment thereof, some courts say that it is an acceptance.⁸ A promise to accept is *nudum pactum* where the depositor has no funds,⁹ but may be binding as an estoppel, if communicated to the holder, according to one case.¹⁰ If the bank does accept the check to the holder who is in good faith, the drawer is released,¹¹ and the bank becomes liable upon the check, whether it has funds or not.¹² The holder of an accepted check may therefore sue the bank.¹³ But, unless the check has been either orally or otherwise accepted, the holder has no cause of action against the bank—his recourse is upon the drawer.¹⁴ A check drawn generally upon

⁷ First Nat. Bank v. Whitman, 94 U. S. 343; Grocer Co. v. Farmers' Bank, 71 Mo. App. 132. *Contra*, Peck v. People's Nat. Bank, 88 Tenn. 380; Millard v. National Bank, 3 McArthur, 54; Seventh Nat. Bank v. Cook, 73 Pa. 483; Dodge v. Nat. Ex. Bank, 20 Ohio St. 234; Commercial Nat. Bank v. Lincoln Fuel Co., 67 Ill. App. 166.

⁸ National Bank v. Cook, 73 Pa. 483, and last two cases cited. But in Pennsylvania this credit may be withdrawn in accordance with a clearing-house rule. German Nat. Bank v. Farmers' Dep. Bank, 118 Pa. 294. The rule of the Supreme Court of the United States (First Nat. Bank v. Whitman, 94 U. S. 343) is the right one, because there is no novation. But Saylor v. Bushong, 100 Pa. 23, where the depositor directed, and the bank kept enough, to pay the check, is correct, because there was a novation. Commercial Nat. Bank v. Lincoln Fuel Co., 67 Ill. App. 166, is wrong.

⁹ Morse v. Mass. Nat. Bank, 1 Holmes, 209.

¹⁰ Nelson v. First Nat. Bank, 48 Ill.

36. The court says it is binding as a contract; but what right had the bank to go into the business of buying corn? The promise might be turned into a representation as to credit, and thus be an estoppel. But the representation was not made to the check-holder, so how could he sue upon it? One case holds that he could sue. Chanute Nat. Bank v. Crowell, 6 Kan. App. 533. See Springfield Marine Bank v. Mitchell, 48 Ill. App. 486, a unique decision.

¹¹ French v. Irwin, 4 Baxt. 401; First Nat. Bank v. Leach, 52 N. Y. 350; Born v. First Nat. Bank, 123 Ind. 78.

¹² Farmers' Bank v. Butchers' Bank, 69 N. Y. 125; Lynch v. First Nat. Bank, 107 N. Y. 179; Hill v. National Trust Co., 108 Pa. 1.

¹³ Lunt v. Bank of North America, 49 Barb. 221; Commercial Nat. Bank v. First Nat. Bank, 118 N. C. 783; Bank of Republic v. Millard, 10 Wall. 152; Ames v. York Nat. Bank, 103 Mass. 326.

¹⁴ Bank of Republic v. Millard, 10 Wall. 152; First Nat. Bank v. Whitman, 94 U. S. 343; Florence Mining

a deposit is not an equitable assignment of any portion thereof,¹⁵ nor an assignment of the whole thereof, where it is for the full amount of the deposit.¹⁶ This is the necessary result of the rule as to checks that is held throughout the commercial world; but if a check is drawn upon a particular fund, and so understood as between the parties, it is operative upon that fund *pro tanto*,¹⁷ but a check or draft drawn generally is not so.¹⁸

§ 147. Rule in some states.—Yet in spite of the great weight of authority, the usage of the commercial world, the necessities of business, the convenience of banking transactions and the dictates of common sense, as settled by the courts of England and America, it is held in Illinois,¹ Kentucky,² South Carolina,³ Nebraska,⁴ and perhaps Texas,⁵ that the holder of a check can sue upon it, if when presented at the bank the depositor has sufficient credit to meet the whole of it,⁶ but not a lesser amount.⁷ This same rule was adopted

Co. v. Brown, 124 U. S. 385, and every state in the Union, except those mentioned in the next section.

¹⁵ Fourth St. Bank v. Yardley, 165 U. S. 634; Florence Mining Co. v. Brown, 124 U. S. 385.

¹⁶ See cases last cited.

¹⁷ Fourth St. Bank v. Yardley, 165 U. S. 634. This case must be closely confined to the particular facts, or it is misleading. See also Coates v. First Nat. Bank, 91 N. Y. 26; Throop Grain Cleaner Co. v. Smith, 110 N. Y. 83; First Nat. Bank v. Clark, 134 N. Y. 368. But compare First Nat. Bank v. Dubuque Ry. Co., 52 Iowa. 378.

¹⁸ Bush v. Foote, 58 Miss. 5; Jones v. Pacific Co., 13 N. W. R. 359; First Nat. Bank v. Dubuque, etc. Ry. Co., 52 Iowa, 378; Hawes v. Blackwell, 107 N. C. 196. This last case succeeds in being wholly unintelligi-

ble as to the check-holder's rights against the bank. The court seemed not to have any well-defined idea upon the subject. See also the cases cited in the three preceding notes.

¹ Munn v. Burch, 25 Ill. 35, and cases to the present time.

² Lester v. Given, 8 Bush, 357; Herndon v. Louisville Banking Ass'n, 10 Ky. Law R. 584.

³ Fogarties v. State Bank, 12 Rich. Law, 518; Simmons Hardware Co. v. Bank of Greenwood, 41 S. C. 177.

⁴ Fonner v. Smith, 31 Neb. 107.

⁵ First Nat. Bank v. Randall, 1 White & W. Civ. Cas. Ct. App., sec. 975.

⁶ See cases last cited and those cited in note 27 to this section.

⁷ Coates v. Preston, 105 Ill. 470; Pabst Brewing Co. v. Reeves, 42 Ill. App. 154.

in the intermediate appellate courts of Missouri,⁸ but was rejected by the Supreme Court of that state.⁹ Iowa adopted it,¹⁰ but soon afterwards repudiated it.¹¹ Louisiana recognizes an assignment by check where the check corresponds to the whole deposit.¹² But all the cases agree that presentment is necessary to give the holder any right against the bank,¹³ except, it has been said, that the drawing of the check gives the holder thereof precedence over a garnishment.¹⁴ And finally, the rule must be in these states that the check takes effect upon moneys deposited after the check is drawn.¹⁵ The situation of a banker in these peculiar states is most insecure. Suppose a check is countermanded after presentation. The owner of the deposit, if the jurisdictional facts exist, can sue him in the United States court and obtain judgment if the banker pays the check. For the federal courts will be governed by the general rule, and will not follow the local law. But the holder of the check can sue him in the state courts and get judgment also. So it would be in the case of an un-presented check in the hands of a *bona fide* holder. It is nothing less than monstrous that such a condition should exist. As we pointed out in section 139, *ante*, this very condition confronts every bank in case of an insolvent depositor. This rule introduces such difficulties into the law that the grounds of it are worthy of serious attention, not less so on account of the fact that both Mr. Morse and Mr. Daniel have given the

⁸ *McGrade v. German Sav. Inst.*, 4 Mo. App. 330; *State Sav. Ass'n v. Boatmen's Sav. Bank*, 11 Mo. App. 292; *Senter v. Continental Bank*, 7 Mo. App. 532.

⁹ *Dickenson v. Coates*, 79 Mo. 250; *Coates v. Doran*, 83 Mo. 337.

¹⁰ *Roberts v. Corbin*, 26 Iowa, 315.

¹¹ *First Nat. Bank v. Dubuque, etc. Ry.*, 52 Iowa, 378.

¹² *Gordon v. Muchler*, 34 La. Ann. 604. But it denied the general right. *Case v. Henderson*, 23 La. Ann. 49. Perhaps Ohio belongs in this list with Louisiana. *Gardner*

v. National City Bank, 39 Ohio St. 600, was a check for the whole deposit. Compare *Railway Co. v. Metrop. Nat. Bank*, 54 Ohio St. 60.

¹³ See cases cited in note 2 and note 30 to this section.

¹⁴ *Detheridge v. Crumbaugh*, 8 Ky. Law R. 592. Illinois holds otherwise. See note 30 to this section. These courts cannot agree even upon their own rule.

¹⁵ *Rosenbaum v. Lytle*, 8 Ky. Law R. 607. This is implied in all the Illinois cases. See note 30 to this section.

rule their enthusiastic commendation. The leading case is *Munn v. Burch*.¹⁶ The opinion is by Chief Justice Caton. He was no doubt a man of strong original power; but he cannot be said to have had any accurate scientific knowledge of the principles of the law. He put the holder's right upon three grounds: (1) that the check is an equitable assignment; (2) that the promise of the bank to the depositor to honor his check is made for the benefit of the check-holder, who may sue upon it; (3) that there is an implied contract between the check-holder and the bank. The first ground is refuted by all the other decisions to the effect that no assignment takes place until presentation, up to which time the bank can apply the deposit on its own claim,¹⁷ and the maker can revoke the check.¹⁸ It cannot in fact be an

¹⁶ 25 Ill. 35. This opinion was written at a comparatively early day. It really was a presumption for a court in a state that had so little banking to assume to talk with such absolute aplomb of commercial usage. The case was a hard one, and hard cases make bad law. It should be remembered that it was an equity case, and is no authority for the proposition that the holder can sue at law. The facts of the case were that a man had a check upon a bank for wheat sold to a buyer for eastern people. The check was brought to the bank and the buyer had funds. The check was left there and by the bank was charged against the account of the drawer. It was therefore accepted. But a draft of the buyer's came back protested, and the bank charged off the credit and refused to pay the check, but at the same time the bank had the bill of lading for the wheat and actually got the proceeds. It would have been a simple matter to hold that the check had been accepted and that

the holder could sue. But neither court nor counsel saw this obvious solution, and the consequence was a great mass of *dictum* now become law in Illinois.

¹⁷ See cases cited in note 30. It is probable that this peculiar idea is due to a confusion in the minds of the judges between the relation of debtor and creditor, and the old idea that a man actually had his own money with his banker. This same confusion survives in common speech and the courts are compelled to give it effect in wills. A bank credit passes under a bequest of ready money or money in hand. *Parker v. Marchant*, 1 Ph. 356; *In re Powell, Johns*, 49; *Fryer v. Rankin*, 11 Sim. 55; *Stern v. Richardson*, 37 L. J. Ch. 369; *Varsey v. Reynolds*, 5 Russ. 12; *Langdale v. Whitfield*, 27 L. J. Ch. 795.

¹⁸ This is implied in the Illinois cases. *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398, admits that an assignment in bankruptcy revokes an unrepresented check.

equitable assignment, because no consideration is paid for it; it is not payment in itself; ¹⁹ it discharges nothing until acceptance; the original claim remains. It is merely an order to pay, and does not take effect upon the deposit as a fund existing when it was drawn, but upon what exists when it is presented.²⁰ Otherwise it might be an assignment of a credit not in existence when it was made, and hence not an assignment at law at all. It is only an order and not an assignment, because the drawer is not released until it is accepted.²¹ Neither of the text writers spoken of above relies upon this ground as tenable. Next it is said that the promise of the bank to the depositor is made for the benefit of the third party, the check-holder, and therefore he can sue upon it. But this ground is based upon an actual contract, expressly made. A *quasi*-contract arising *ex lege* is not an obligation to a third party. Conceding such a contract actually made, the rule is that when a third party sues upon a contract made for his benefit, he must be a person ascertained at that time and pointed out by the contract.²² He cannot be "all the world," as Chief Justice Caton seems to think. The very nature of the transaction is such that the third party cannot be ascertained at the time of making the contract. But the real difficulty with this proposition is that the engagement existing between the depositor and the bank is not a contract at all, but a *quasi*-contract. It is a customary duty imposed as the result of a relation, and is not an actual express contract nor one implied as of fact from circumstances.²³ Therefore there is no chance left for this contention. The third ground is the one relied upon by the text writers, to wit: that there is an implied contract between the check-holders and the bank which creates a

¹⁹ Thomson v. Bank of Brit. No. Am., 82 N. Y. 8.

²⁰ Rosenbaum v. Lytle, 8 Ky. Law R. 607. See note 15 to this section.

²¹ Metrop. Bank v. Jones, 137 Ill. 634.

²² See *Ætna Nat. Bank v. Fourth*

Nat. Bank, 46 N. Y. 82; *Montgomery v. Reif*, 15 Utah, 495, and cases therein cited; and see specially *National Bank v. Eliot Bank*, 5 Am. Law Reg. 711, and *Simson v. Brown*, 68 N. Y. 355.

²³ See § 128, *ante*.

duty. This duty must arise either when the check is given or when it is presented. It must be the latter, because no duty whatever on the part of the bank exists until that time.²⁴ This duty must arise out of a contract or out of a particular relation. It will not be contended that there is any express contract or one implied prior to the time of presentation. Now, if the duty arises out of a contract, it must be a contract made either expressly or impliedly at the time of presenting the check. No contract is made then expressly or impliedly, because none such is contended for except a customary duty arising from the general practice, which is called a contract. The first objection is that there is no such customary duty, as is settled by the almost unanimous concurrence of the courts of England and America and the practice of the business world. But the very statement of the so-called implied contract shows that it is a *quasi*-contract, not a contract proper, *i. e.*, one implied as a fact by agreement. Therefore it arises out of a relation and depends upon the fact as to whether such a customary duty has so long prevailed as to have become an absolute rule of law. This is shown by the analogous relations of carriers and innkeepers. But here a court has invented a customary duty for itself and then enforced it, when it could only enforce such a rule of law if the customary duty had prevailed so generally or for so long as to become a fixed and permanent rule of law. On either ground, then, this rule is untenable. But the courts and text writers have lost sight of the fact that the depositor's right is a double one: first, an actual contract creating a debt; second, a customary duty creating an obligation *quasi*-contractual. The debt is not at all the result of a duty, but the rule that gives the holder a right to sue seeks to create an actual contract of debt out of a customary duty, which never creates more than a *quasi*-contract. It must be remembered that a debt and the common-law remedy of debt are not the same thing. The action of debt lies on *quasi*-contract, but a *quasi*-contractual obligation is not

²⁴ See note 20 and note 18 to this section.

a debt. Text writers have confused debt with the action of debt, or they never could have said that a duty creates a debt. Yet the decisions going upon other grounds generally contend that the alleged contract between the parties creates the duty, and, because the nature of *quasi-contract* has not been until lately well understood,²⁵ it had been conceded that there is a contract between the depositor and the bank to honor his checks upon his fund. The right of the check-holder to recover is denied, because he is not a party to the contract.²⁶ This rule is unvarying wherever a contract is insisted upon as creating a relation out of which a duty arises. A contract of carriage of passengers,²⁷ a contract between attorney and client,²⁸ a contract between a telegraph company and the sender or receiver,²⁹ can only be sued upon by one who is a party to the contract, not by some one who is injured by the manner in which the contract is failed to be performed. This analogy is complete and runs all through the law, that a man to claim the benefit of a contract must be in some way a party to it. The point has already been noticed that the check-holder is not a party to any contract between the bank and its depositor, even if there can be said to be a contract between them as to the duty to pay checks. There is of course the contract of loaning, which creates a debt, but this duty is wholly outside of that relation. Such are the reasons which lead us to think that the rule in Illinois and the other states mentioned is unsound and has no excuse for existing. But the prolonged and never-ending trouble that it causes the courts of that state³⁰ would be good reason for its abolition. But

²⁵ Keener on *Quasi-Contract*, a most admirable work and one that reflects the highest credit upon the jurists of this country.

²⁶ See the opinions in the cases cited in note 14 to § 140, *ante*.

²⁷ *Winterbottom v. Wright*, 10 M. & W. 109. *Heaven v. Pender*, 11

Q. B. D. 503. cannot be considered as overruling this case.

²⁸ *Nat. Bank v. Ward*, 100 U. S. 195.

²⁹ *McCornick v. Western Union Tel. Co.*, 79 Fed. R. 449.

³⁰ The course of Illinois decisions is an excellent illustration of the fact that the disregard of a sound

the courts of the state seem so firmly wedded to this proposition, untenable as it is, and confusing as it renders the law

principle of law is, as Pope Pius IX said of the marriage of a priest, "an act which carries its own punishment with it." We have already pointed out the absurd results of this rule in the instances mentioned in note 26 to § 138, *ante*, and note 22 to § 140, *ante*, as well as the monstrous situation of a bank in case of insolvency in note 2 to § 139, *ante*. After the decision in *Munn v. Burch*, 25 Ill. 35 (which Chief Justice Breese at 68 Ill. 401, calls *Monroe v. Beach*), the court was compelled to admit the right of the depositor to sue on the check even though it had been presented. *Chicago Ins. Co. v. Stanford*, 28 Ill. 168. But the modification had to be at once made that the holder gained no right until he presented the check. *Shaffner v. Edgerton*, 13 Bradw. 132; *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398. The check was called an equitable assignment, yet suit upon it at law was allowed. Next it was said that the check must be payable in money, not exchange. *Hogue v. Edwards*, 9 Bradw. 148. This case displays almost a genius for being wrong. A check was given on a bank with a memorandum statement on it to show it was to obtain a draft. The check was paid by the issuance of a draft. The draft was never paid, and the holder of the check sued the bank. And it was held he could not recover. The check, of course, was accepted for so much money, and could be sued on anywhere by the holder. The only question was as to whether the issuance of a

draft, never paid, was payment. Of course it was not payment. *Indig v. Nat. City Bank*, 80 N. Y. 100. The bank obtained just so much money without giving anything for it. The court intimates that the holder of the check could sue the drawee on the draft, but that is absurd, because it was never accepted. The draft was in fact a check on another bank, and the payment of that check was stopped or rather countermanded. The check was no less a check because drawn by one bank on another. *State v. Vincent*, 91 Mo. 662. Here the court recognize the right of the drawer to stop payment on the check as against the holder. A rehearing was had, and in 9 Bradw. 263, the court in a *per curiam* opinion, although its gross error had been pointed out to it, yet persisted in its error, and said that there was no privity between the holder of the check and the bank, although the bank had accepted the check. The court seemingly holds also that the payee of the check, called a draft, could not sue the person who issued it. A more iniquitous result cannot be conceived. Yet here we have the doctrine of the holder suing, absolutely annihilated for want of privity in the case of a check drawn by a bank. Next we find that the assignment of the check carries with it legal title to the drawer's deposit for the sum named in the check. *Merchants' Nat. Bank v. Ritzinger*, 20 Bradw. 27. In other words, the assignment of an equi-

of banking, that there is little hope of a change. "Ephraim is joined to idols; let him alone;" but a later saying of the

table assignment gives the assignee an assignment at law. Then we are told that a demand of payment and acceptance by telegraph are not sufficient to give the holder the right to sue. *Myers v. Union Nat. Bank*, 27 Ill. App. 254. Then a demand before banking hours is held sufficient to give the holder the right to sue. *American Ex. Nat. Bank v. Chicago Nat. Bank*, 27 Ill. App. 538. Then we are told that the bank cannot set off its own debt against the depositor where a check has been presented. *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398; *Niblack v. Park Nat. Bank*, 169 Ill. 517. This is perhaps the worst result of the rule. A banker carrying a customer on his deposit may find the whole deposit wiped out by a check suddenly presented. This seems to be on the theory that title passes to the holder upon the drawing of the check, otherwise it could not cut off the banker's set-off. But the court has abandoned this idea by holding emphatically, as it has, that there is no assignment until presentation of the check. But if this is so, the original demand of the holder of the check is ended, and the drawer ought to be released, because if there are funds the presentation is the same as an acceptance of the check. Yet *Ridgely Bank v. Patton*, 109 Ill. 479, holds that the holder can sue and attach on his original claim, and yet sue the bank on the check. Even such a devotee of the new doctrine as Mr. Daniel scouts this absurd idea.

2 Daniel, Neg. Inst. (4th ed.), § 1639. The court, with the courage of its convictions, originally held that acceptance or certification of the check cuts no figure; it does not release the drawer. *Bickford v. First Nat. Bank*, 42 Ill. 288; *Rounds v. Smith*, 42 Ill. 245; *Brown v. Leckie*, 43 Ill. 497. The court's language was not confined to a check certified at the instance of the drawer. The theory was that, if the check was an assignment, acceptance was perfectly immaterial. But the court was compelled to recede from this position. It was impossible to leave a great commercial city like Chicago in such a condition. And *Metropolitan Bank v. Jones*, 137 Ill. 634, holds that acceptance by the bank releases the drawer. The court courageously undertakes to say the former rulings of the court are not in point because they were cases of certification to the drawer of the check; but it overlooked *Wood v. Merch. Sav. Co.*, 41 Ill. 267, which was a certification of a note. The opinion in *Metropolitan Bank v. Jones*, *supra*, says no title passes to the holder by way of assignment until presentation. But the assignment is the assignment of what is equal to so much cash, and if the holder of the check gets title to the cash by presentation, what further is needed to give him title to the cash, so as to discharge the drawer? But then comes *Bank of Antigo v. Union Trust Co.*, 149 Ill. 343, and says that the check is an assignment only as between the drawer

prophet asserts, as a celebrated writer wittily observes, that Ephraim shall remain "a wild ass, alone by himself."

and drawee before presentation. The learned judge must mean payee instead of drawee, but the confusion produced by this doctrine is so great that an erudite court must go "thundering down the ages" as holding the belief that the payee of a check is its drawee. Then we are informed that although the check on presentation does not release the drawer, yet the bank loses its right of set-off as against a presented check, although the debt is matured. *Brown v. Leckie*, 43 Ill. 497; *Fourth Nat. Bank v. City Nat. Bank*, 69 Ill. 398. And it loses this right as against a holder on an unmatured demand even though the check be not presented (*Merchants' Nat. Bank v. Ritzinger*, 20 Bradw. 27), it being immaterial that the maker is insolvent. *Merchants' Nat. Bank v. Robinson*, 47 Ky. 552. Again it is held that the outstanding unrepresented assignment by check is not good against the bank's assignment of the deposit to itself by application of it on the debt of the depositor. *Fort Dearborn Nat. Bank v. Blumensweig*, 46 Ill. App. 297. Yet it is plain that the same rule ought to apply to an unmatured demand if the depositor is insolvent. The latter is a case of equitable set-off, which ought to be good against an equitable assignment. If the holder has a claim against the bank by reason of a check, he surely ought to be able to set off the check which he holds against the debt which he owes to the bank. But by this process any depositor, by giving checks to men

who owe the bank, can get paid in full, while other depositors must take what is left. The bank's assets could be reduced to a minimum by such a process. See § 224, *post*. Finally, the court long ago, in *McCagg v. Woodman*, 28 Ill. 84, held that a depositor could set off his deposits against a note of his own to the bank maturing after insolvency. This was right, as it was a good case of equitable set-off. Yet the bank cannot set off its unmatured demand against an insolvent depositor. The result is most inequitable. To be consistent the court should hold that the holder of a presented or unrepresented check can set it off against an insolvent bank for a debt which is unmatured at the date of the insolvency. This doctrine has so confused the court that it has forgotten that a bank cannot lend its credit for accommodation. Turning now to overdrafts, the court holds that if an officer of the bank promises the drawer without funds to pay his check, and the drawer tells this to the holder, the holder can sue upon it as a contract made with himself. *Nelson v. First Nat. Bank*, 48 Ill. 36. And by this decision the court puts a bank in the position of guaranteeing a corn-merchant's account merely for his accommodation. It went further in *Springfield Marine Bank v. Mitchell*, 48 Ill. App. 486, and made a bank a horse-dealer by estoppel.

This farrago of warring decisions, *rudis indigestaque moles*, all results from an attempt to disre-

§ 148. Order of payment of checks.—It is a part of the duty of banks, which some courts mistakenly call an implied contract,¹ to pay the checks of a depositor in the order in which they are presented.² If checks are presented at the same time, the bank may pay in the order that it pleases.³ If there are more accounts than one, and one or more of them are disputed, the bank may apply the check upon an undisputed account.⁴ It follows from the rule as to order of payment, that where a creditor of the depositor has obtained a lien by trustee process and has taken a check and

guard a plain and well-settled rule of law produced by the rules of business. The text writers who support this rule had not contemplated the practical results of its working. The history of the decisions in one state shows that "a good thing is," as Howells somewhere says, "never so much of a good thing as when it gets thoroughly started." The painful spectacle presented by these Illinois decisions ought to be a valuable lesson to code-tinkers and the perpetrators of crude judicial or other legislation. Those people cannot be made to understand that the vital principles of the common law are the result of ages of experience and common sense tried and tested in the discussions in courts from day to day, from year to year, from century to century. The product of these discussions has been a system of law, imperfectly developed here and there, it is true, but one whose ideal is simply justice.

"On the rock primeval, hidden in the past its bases be,
Block by block the endeavoring
ages built it up to what we see."

Its principles are not for yesterday, but for to-day. Its marvelous

capacity for a natural growth is proven every day by its rapid adaptation to new conditions. As the great Grecian said of the fundamentals of morals we may say of the vital principles of the common law: "The power of the Lord is mighty in them and groweth not old." Take, for instance, the development of jury trial and the rules of evidence. What a jury or other trial is without such rules we see in the hideous travesties of France. Those rules are of the same character, for they, as Lord Erskine splendidly says, are founded in the philosophy of nature, in the truths of history and in the experience of common life. Matters of mere forms of pleading, or of the competency of witnesses, may vary from day to day, but the principles of substantive law, being a natural growth, cannot be tampered with without great evil resulting.

¹ Chambers v. Northern Bank, 5 Ky. Law R. 123.

² National Safe Co. v. People, 50 Ill. App. 336.

³ Dykers v. Leather Manuf. Bank, 11 Paige, 612.

⁴ Hauptmann v. First Nat. Bank, 83 Hun, 78.

released his lien, and another trustee process is levied before his check is cashed, he loses his lien.⁵ The same result would follow if a check were paid before he presented his own check.

§ 149. Refusal of payment.—We have already noticed the instances where a bank may refuse payment. It may refuse to pay a part of a check,¹ but may agree to pay *pro tanto*.² If it refuses to pay on account of defects in the check, such as to the signature, the defect should be pointed out.³ It cannot refuse to pay checks because they were given without consideration or illegally,⁴ unless, of course, payment on the check has been stopped. The checks must be paid in the form and manner prescribed by the depositor.⁵ The bank is entitled to a reasonable opportunity to examine its books before payment.⁶

§ 150. Accepted and certified checks.—By common consent and the usage of the commercial world, the certification of a check, or the acceptance of it by the bank at the instance of the payee, discharges the drawer of the check

⁵ Bullard v. Randall, 1 Gray, 605.

¹ Coates v. Preston, 105 Ill. 470; Lowenstein v. Bressler, 109 Ala. 326; Eichelberger v. Finley, 7 Har. & J. 381; In Matter of Brown, 2 Story, 519. *Contra*, Bromley v. Comm. Nat. Bank, 9 Phila. 522.

² Dana v. Third Nat. Bank, 95 Mass. 445. But the bank cannot force the holder to receive part payment. In Matter of Brown, 2 Story, 519.

³ Illinois State Bank v. Batty, 5 Ill. 200.

⁴ McCord v. Cal. Nat. Bank, 96 Cal. 197.

⁵ Metrop. Nat. Bank v. Race, 32 Ill. App. 126; Gladstone Ex. Bank v. Keating, 94 Mich. 439. But a bank cannot refuse to pay a check

which is payable to one for the account of another. Ridgeley Bank v. Patton, 109 Ill. 479. But in the absence of other knowledge, would a bank be justified in thinking from such a check that the person for whose account the check was given assented to the arrangement? But probably it would be said that the depositor had the right to direct how payment should be made, and the bank owed no duty to the beneficiary of the check. The check in the above case was payable to an attorney for the account of his client, and the question did not arise.

⁶ State Nat. Bank v. Boettcher, 5 Colo. 185.

and substitutes the bank as a debtor.¹ In other words, a novation takes place. The depositor owes his creditor, and the bank owes the depositor. The three agree that the bank may owe the creditor, and the depositor is discharged. The result is that so much of the depositor's account as corresponds to the accepted or certified check at once becomes the property of the bank;² that is to say, the check is paid. But the same result as to the bank becoming entitled to so much of the depositor's account follows upon a certification granted to the drawer of the check; but in this latter case the transaction is a different one, because there is in fact no novation, there being no third party to the transaction. Hence such a certified check delivered to the payee is not payment of a debt between the drawer of the check and the payee.³ Upon both such descriptions of certified checks the bank becomes responsible to the payee, but with this difference: a certification granted to the drawer of the check, not being payment of any claim as between the drawer and the payee, and not being, therefore, a novation, may be revoked by the bank for a mistake as to the drawer's credit with the bank, except when the check has passed to a *bona fide* indorsee, or when the payee of the check has parted with value or suffered a detriment on the faith of the certification.⁴ The reasons for this rule are that the certification has

¹ See note 11 to § 146, *ante*, and *Nat. Laf. Bank v. Cin'ti Oyster Co.*, 18 Wkly. Law Bul. 350. The bank becomes liable. *Drovers' Nat. Bank v. Packing Co.*, 117 Ill. 100; *Irving Bank v. Wetherald*, 36 N. Y. 335.

² *Merchants' Bank v. State Bank*, 10 Wall. 604. The certification need not be entered on the books or made in banking hours. See the last case and *Brown v. Leckie*, 43 Ill. 497. But the bank is simply a debtor, not a trustee. *Girard Bank v. Bank*, 39 Pa. 92.

³ *Larsen v. Breene*, 12 Colo. 480; *Metropolitan Bank v. Jones*, 137 Ill.

634; *Born v. First Nat. Bank*, 123 Ind. 78; *Minot v. Russ*, 156 Mass. 458. This result follows even though the certification was obtained at the request of the payee. *Randolph Nat. Bank v. Hornblower*, 160 Mass. 401. But this last decision is not sound, because there was a novation.

⁴ *Lynch v. First Nat. Bank*, 107 N. Y. 179; *Goshen Nat. Bank v. Bingham*, 118 N. Y. 349. The owner of the check can claim only to the amount actually expended upon it. *Brooklyn Trust Co. v. Toler*, 65 Hun, 187, 138 N. Y. 675.

been granted by a mistake of the bank. The drawer has no right to complain, because he knew that the official of the bank had no right to grant him a certification of his check when he had no sufficient credit with the bank. The payee of the check who has suffered no detriment, or his indorsee who did not pay value for the check, has no right to complain, because he has lost nothing by the certification.⁵ But where a certification has been granted to the payee or the indorsee of the check, the situation is wholly different. The debt owing by the drawer to the payee, for which the check was given, has been paid by the payee choosing to go to the bank and accepting its certification in lieu of the drawer's debt to him. A complete novation has taken place, and on the strength of the certification the payee has parted with full value, to wit: the debt or claim owing to him by the drawer of the check, which has been paid. To this transaction there were three parties; to the former transaction there were but two. Therefore, a certification granted to a payee or a *bona fide* indorsee of a check is final and cannot be revoked.⁶ But here again courts have refused to see a plain distinction, and they are found holding, in spite of well-settled principles, that the bank may revoke its certification granted to the payee, where he has not altered his position and will lose nothing, as they say;⁷ a statement

⁵ See the cases cited in the last note. The word used in the text is "indorsee," not "transferee." Indorsement is necessary. See the second case in last note.

⁶ *Riverside Bank v. First Nat. Bank*, 74 Fed. R. 276, and cases therein.

⁷ *Second Nat. Bank v. Western Nat. Bank*, 51 Md. 128; *Irving Bank v. Wetherald*, 36 N. Y. 335 (but see this case explained in *Riverside Bank v. First Nat. Bank*, *supra*); *Louisiana State Bank v. Hibernia Bank*, 26 La. Ann. 399; *Bank of Republic v. Baxter*, 31 Vt. 101, *sem-*

ble; *Dillaway v. Northwestern Nat. Bank*, 82 Ill. App. 71. This last case says the check's certification may be rescinded where no rights have intervened. But by the very nature of the transaction rights have intervened, because the drawer's debt to the payee was paid, and the payee has parted with full value, as *Metropolitan Bank v. Jones*, 137 Ill. 634, shows. This assumption in the face of the absolute fact of novation is inexplicable. But the fallacy lies at the base of all these erroneous decisions. But the rule would protect actual expenditure.

which is a contradiction in terms, for he has already taken the check as payment. As a matter of deduction, the same rule would apply to a certification obtained by fraud. It may be revoked, except in the hands of a *bona fide* holder.⁸ The officers of the bank who have implied authority to certify checks are the president,⁹ the cashier,¹⁰ the paying teller,¹¹ and, of course, the board of directors.¹² The usual form of accepting is by writing or stamping the word "good," or "certified" upon it. But a verbal acceptance is good,¹³ except where the drawer has no funds,¹⁴ and except in those states whose statutes require a written acceptance.¹⁵ Although it is said that a promise to accept a check is not binding where the drawer has no funds,¹⁶ yet, if the bank has agreed to accept the check with one who advances value to pay the check, the bank becomes an acceptor.¹⁷ A certification made where the drawer has no funds is not binding, except in the hands of a *bona fide* holder of the check;¹⁸ but it should appear that the certification took place in the usual course of business, even in the case of one in good faith obtaining it.¹⁹ But the bank's liability upon a mistaken or a fraudulent certification is only to the extent of the *bona fide* hold-

See *Brooklyn Trust Co. v. Toler*, in note 4, *supra*.

⁸ *Goshen Nat. Bank v. Bingham*, 118 N. Y. 349. See note 5, *supra*.

⁹ *Claffin v. Farmers' Bank*, 25 N. Y. 293; *Wild v. Passamaquoddy Bank*, 3 Mason, 506.

¹⁰ *Merchants' Bank v. State Bank*, 10 Wall. 604.

¹¹ *Farmers' Bank v. Butchers' Bank*, 28 N. Y. 475. But *contra*, *Mussey v. Eagle Bank*, 9 Met. 373.

¹² See the last two cases.

¹³ *Jarvis v. Wilson*, 46 Conn. 90; *Pierce v. Kittredge*, 115 Mass. 374; *Farmers' Bank v. Dunbar*, 32 Neb. 487; *Barnet v. Smith*, 30 N. H. 256; and see note 4 to § 146, *ante*.

¹⁴ *Morse v. Massachusetts Nat. Bank*, 1 Holmes, 209. It is within

the statute of frauds. But an oral acceptance is good where the drawer is acting for another who has funds. *Leach v. Hill*, 76 N. W. R. 667.

¹⁵ Those states consider an acceptance of a check governed by the rule as to a bill of exchange.

¹⁶ *Bowen v. Needles Nat. Bank*, 87 Fed. R. 430; *Morse v. Massachusetts Nat. Bank*, 1 Holmes, 209.

¹⁷ *Allen Co. Bank v. Carter*, 88 Tenn. 287. This last case goes far enough. The Illinois cases are flagrant errors. See note 10, § 146, *ante*.

¹⁸ *Stevens v. Com. Exchange Bank*, 3 Hun, 147; *Gibson v. National Park Bank*, 98 N. Y. 87.

¹⁹ *Dorsey v. Abrams*, 85 Pa. 299.

er's loss.²⁰ Where the certification is of forged or altered paper, so forged before certification, the certificate warrants the signature of the drawer, but not that of an indorser,²¹ nor the amount of the check,²² and a custom is not admissible proof to show that it does.²³ The bank is not liable to an innocent payee or holder of a certified check, which is altered after certification, unless its negligence gave an opportunity for the alteration.²⁴ A certification of a check payable to a fictitious payee is good in the hands of a *bona fide* holder.²⁵ A demand upon a certified check is necessary before suing upon it, but that demand need not be made within a reasonable time.²⁶ The certified check is good until its efficacy expires by virtue of the statute of limitations.²⁷ It is said that a bank cannot set off the holder's indebtedness to it as against its liability on a certified check,²⁸ but that proposition is, of course, not sound. Possession of a certified check by the drawer raises the presumption that it belongs to the drawer.²⁹

§ 151. Fictitious payees.—The general rule is that a check payable to a fictitious payee is payable to bearer; but if a real person is intended by the name of the payee, the check must be indorsed by that person or by some one with authority from him, otherwise a forgery is perpetrated in

²⁰ Brooklyn Trust Co. v. Toler, 65 Hun, 187, 138 N. Y. 675.

²¹ First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296.

²² Parke v. Roser, 67 Ind. 500; Clews v. Bank of New York, 89 N. Y. 418; Marine Nat. Bank v. City Nat. Bank, 59 N. Y. 67.

²³ Security Bank v. National Bank of Republic, 67 N. Y. 458.

²⁴ Helwege v. Hibernia Nat. Bank, 28 La. Ann. 520.

²⁵ Meridian Nat. Bank v. First Nat. Bank, 33 N. E. R. 247; Merchants' Trust Co. v. Metropolis Bank, 7 Daly, 137.

²⁶ Farmers' Bank v. Butchers' Bank, 16 N. Y. 125; Bank of British North America v. Merchants' Bank, 91 N. Y. 106.

²⁷ French v. Irwin, 4 Baxt. 401.

²⁸ Brown v. Leckie, 43 Ill. 497. This decision is utterly wrong, because as to the drawer as well as the drawee the check would be paid by the bank's credit to the payee by way of set-off. This case is another illustration of the Illinois confusion.

²⁹ Buehler v. Galt, 35 Ill. App. 225.

indorsing the check. But a fictitious payee may be intended although the name of a real person is used.¹ Such checks when paid are good as against the drawer.² But a fictitious payee is not a person who is not in existence, but whom the drawer believes to be in existence.³ Payment upon an indorsement representing such a payee is not payment.⁴ Such is the rule where a drawer is imposed upon to draw a check payable to a fictitious person.⁵ But if the drawer has been guilty of negligence in the manner of drawing the check and perhaps of delivering it that misleads the bank, the payment is good.⁶ The certification of a check made payable to a fictitious payee is good in the hands of a *bona fide* holder thereof.⁷

§ 152. Date upon checks.—It is said by a text writer that if a check is not dated it is never payable,¹ but the law is that such a check may be filled in with the true date, or if not filled in is payable upon demand, so far as the bank is concerned. The issuing of the check with a blank date is implied authority to any holder to fill in a date.² But caution would dictate to a bank a request to have the check properly filled in as a measure of protection to its depositor. But a check is not payable until its date.³ A check post-dated

¹ Irving Bank v. Alley, 79 N. Y. 536; First Nat. Bank v. Farmers' Bank, 76 N. W. R. 430.

² Phillips v. Merchants' Nat. Bank, 140 N. Y. 556.

³ Shipman v. Bank of the State, 126 N. Y. 318. *Contra*, Bank of England v. Vagliano, (1891) App. Cas. 107.

⁴ Armstrong v. Pomeroy Nat. Bank, 46 Ohio St. 512, and case last cited.

⁵ Case last cited. Such a case becomes merely a case of payment upon a forged indorsement of the payee's name. See §§ 154, 156, *infra*.

⁶ Burnet Sav. Co. v. German Nat. Bank, 4 Ohio Dec. 290; Smith v. Mechanics' Bank, 6 La. Ann. 610; Craw-

ford v. West Side Bank, 100 N. Y. 50, *contra* as to the negligence in the manner of delivering the check.

The true rule would be this: If the bank was guilty of negligence in paying the check, the antecedent negligence of the drawer is immaterial, provided that negligence did not throw the bank off its guard.

⁷ See note 25 to preceding section.

¹ Morse on Banking, 238.

² See Crawford v. West Side Bank, 100 N. Y. 50, and 2 Ency. Law (2d ed.), 255.

³ Gordon v. Commonwealth Bank, 6 Duer, 76. Compare Taylor v. Sip, 30 N. J. Law, 284.

on its face is an inland bill of exchange⁴ and is entitled to days of grace.⁵ A check signed before its date, which is altered by the depositor's book-keeper as to the date and cashed, the depositor having been guilty of no negligence in drawing the check, leaves the bank liable.⁶ But the bank is only liable to the depositor upon an altered check for paying; as to other parties it is not liable, and takes no risk except that the drawer's signature is genuine.⁷ If a bank pays a check before its date it is not entitled to charge it against the depositor's account.⁸

§ 153. Revocation of check.—The cases where checks have been in effect revoked by an assignment of the deposit, or by the garnishment of the deposit, or by the death or insolvency of the depositor, or by the bank's application of the deposit, have been already considered. But the drawer of a check has the right to revoke it at any time before it is accepted,¹ or, if not accepted, at any time prior to its payment.² In those states which allow the holder to sue upon a check, it may be revoked at any time prior to its presentation.³ But a check may also be revoked by the payee,⁴

⁴ See § 205, *post*.

⁵ See last note.

⁶ Crawford v. West Side Bank, 100 N. Y. 50.

⁷ National Bank of Com. v. National Mechanics' Bkg. Ass'n, 55 N. Y. 211; Crawford v. West Side Bank, 100 N. Y. 50. This statement is inserted here to prevent the text from being misleading.

⁸ See cases cited in notes 3 and 6 to this section.

¹ Acceptance releases the drawer and substitutes the bank as debtor. It is merely another name for one species of payment. If the bank pays a revoked check through negligence, it is liable though the depositor agreed the bank should not

be liable. Elder v. National Bank, 55 N. Y. Supp. 576.

² Dykers v. Leather Mfg. Bank, 11 Paige, 612. Compare Freund v. Importers' & Traders' Bank, 76 N. Y. 352, where the check had been certified. If notice is given, the burden is on the bank to show payment prior thereto. Albers v. Commercial Bank, 85 Mo. 173. Pease v. Landauer, 63 Wis. 29, denies this arbitrary right and says it can only be exercised for good cause. See also Bremer Co. Bank v. Mores, 73 Iowa, 289.

³ Tramell v. Farmers' Nat. Bank, 11 Ky. Law R. 900. There is a peculiar case in Massachusetts, which held that the drawer of the check

⁴ Public Grain & Stock Ex. v. Kune, 20 Bradw. 137.

when the check has been unindorsed by him, and, on principle, whenever the check has not passed into the hands of a *bona fide* holder, at any time prior to acceptance, or in some states presentation, or, if not accepted, at any time prior to payment. But a check indorsed by the payee's authorized agent, during the life-time of the payee, may be paid by the bank to the holder after the payee's death.⁵ If the check is paid by the bank after having been properly revoked, the bank becomes liable for the amount of the check either to the depositor revoking⁶ or to the payee revoking.⁷

§ 154. Forged or altered paper.—Forgery may consist of a forgery or alteration in the body of a check really signed by the depositor, or it may consist of the simulation of the depositor's signature, or it may be that the name of a payee has been forged upon the check. The difference between the three cases is very marked as regards the rights of a bank on the payment of forged or altered paper. The case of payment by a bank of a check on itself, where the drawer's signature is forged, is governed by the rule that a bank is bound to know the signature of its own depositor.¹ Therefore, taking the case first of certification of a check, which is a species of payment, if the bank certifies a forged check on itself, the certification ought to be, it might seem, at first blush, final and irrevocable as to an innocent holder of the check, where the forgery consists of a forgery of the name of the drawer.² But the rule that the certification of

could not stop payment of his own check given to one who had passed it to the bank, but which the bank had not paid. *Charles River Nat. Bank v. Davis*, 100 Mass. 413.

⁵ *Brennan v. Merchants' Bank*, 62 Mich. 343.

⁶ *Schneider v. Irving Bank*, 1 Daly, 500.

⁷ *Public, etc. Ex. v. Kune*, 20 Bradw. 137. And this ought to be the rule in those jurisdictions,

which do not permit the holder to sue before certification or acceptance. But see note 8 to § 146, *ante*. The action should be for money had and received, and should not be upon the check itself.

¹ The cases cited in the notes following this all recognize this very obvious proposition.

² See the principle decided in *Riverside Bank v. First Nat. Bank*, 74 Fed. R. 276, 38 U. S. App. 674.

a check, forged as to the name of the drawer, only binds the bank as to the payee's loss upon it, is proper, because the bank cannot charge the check against the drawer. Herein lies the distinction between this case and that of certification to the payee, owing to a mistake as to the state of the account, spoken of in section 150, *ante*. The bank is, of course, held as to a *bona fide* indorsee, for he relied upon the bank's certificate when he paid value. Even if a certified check has been stolen, a *bona fide* holder of negotiable paper is protected as against the bank.³ If the person obtaining the check to be certified had notice of the forgery, his conduct, it is plain, would be a fraud and he could claim nothing from the certification. If the holder of the check, however, believes it to be good and alters his position on the strength of the certification, he becomes a *bona fide* holder for value.⁴ But in the case of a holder who has lost nothing by the certification, the rule ordinarily would be, both thinking the check genuine, that the certification could be revoked on the ground of mutual mistake.⁵ The bank, it is true, is bound to know its drawer's signature, as it is bound to know the state of the drawer's account; yet the holder of the check has parted with nothing of value on the strength of the certificate.⁶ But there are cases where the bank can charge a check forged as to the maker's name against the

But the rule is that the certification of a check forged as to the name of the drawer can be revoked in the hands of the person to whom it has been certified, except as to his loss upon the certification. See § 150, *ante*, where the authorities are given as to a mistake in the drawer's account.

³ *Nolan v. Bank of New York*, 67 Barb. 24.

⁴ *Meads v. Merchants' Bank*, 25 N. Y. 143. The element of knowledge of the falsity is lacking to make this a case of false representation by the bank. The liability

of the bank is based upon its contract of certification.

⁵ It may be considered either a mistake as to the existence of the subject-matter or a mistake as to its essential qualities, preferably the latter. See for the rule, *Clark on Contracts*, 298. See § 150, *ante*, notes 6 and 7.

⁶ See § 150, *ante*, for the reasons that govern this case. There is some question as to the rule in case of a mistake as to the state of the account. See *Riverside Bank v. First Nat. Bank*, *supra*, and note 7 to § 150, *ante*.

maker.⁷ In such a case the bank, under any circumstances, ought not to be permitted to revoke its certification or to recover its payment, because it would otherwise charge the check against the drawer; yet the drawer would have paid nothing by the check.⁸ Therefore, in a suit between the bank and the holder to whom it had certified a check forged as to the drawer's name, there would necessarily be litigated the right of the matter as between the bank and the drawer of the check. So that the common sense of the matter is that certification of a check forged as to the maker's name, where the bank can charge the check against the drawer, ought to bind the bank to the person to whom the certification was given or into whose hands the certified check came, if he were in good faith. The same rule would apply to a check paid, whatever the circumstances, where the forgery was of the drawer's signature.⁹ Such payment is final. But leaving out of view this exceptional case of a certified check, if the person to whom the check was paid was at fault,¹⁰ or did not perform his whole duty in the matter,¹¹ the bank will not be estopped by its payment. These rules suffer some modification owing to the rules of clearing-houses and transactions between banks, as will appear in the next section. As regards the depositor, the bank cannot charge

⁷ See the cases cited in notes 13 and 14, *infra*.

⁸ In that case there would be no mistake, since the check would be genuine as to the drawer. See *Levy v. First Nat. Bank*, 27 Neb. 557, which apparently recognizes that the bank must be liable to the drawer if it pays the check.

⁹ See *Bank of U. S. v. Bank of Georgia*, 10 Wheat. 333; *First Nat. Bank v. Ricker*, 71 Ill. 439; *Deposit Bank v. Fayette Bank*, 10 Ky. Law R. 350; *Bank of St. Albans v. Farmers' Bank*, 10 Vt. 141; *Germania Bank v. Boutel*, 60 Minn. 189. The same rule applies on a certificate

of deposit. *Stout v. Benoist*, 39 Mo. 277. See 2 Har. L. R. 297.

¹⁰ *Levy v. First Nat. Bank*, 27 Neb. 557; *Merchants' Bank v. McIntyre*, 2 Sandf. 431; *National Bank v. Bangs*, 106 Mass. 441. This last case seems to say that where a payee has given credit to the check by his indorsement, he cannot claim that the bank was bound to know its depositor's signature. But this rule only applies between banks. See next section.

¹¹ *City Bank v. First Nat. Bank*, 43 Tex. 203; *Rouvant v. National Bank*, 63 Tex. 610; *First Nat. Bank v. Ricker*, 71 Ill. 439; *Ellis v. Ohio Life Ins. Co.*, 4 Ohio St. 628.

against him paper which he never signed.¹² But the depositor may have been at fault in misleading the bank by his conduct prior to the time the bank paid the forged paper. In such a case, if his conduct amounts to an estoppel upon him, the bank may charge such checks against him.¹³ The depositor may also have been guilty of wrong conduct after the bank has paid the check. The majority of courts, basing their holding upon the proposition that the subsequent negligence of the depositor misleads the bank, recognize that a depositor owes to his banker the duty of examining the returned vouchers and at once notifying him of the forgery.¹⁴ The failure in this duty is said to be an implied admission of the genuineness of the signature,¹⁵ or a ratification of the payment.¹⁶ Even if the depositor commits this duty to an agent who happens to be the forger, the depositor is bound by the agent's act, either in not communicating his own

¹² *Hardy v. Chesapeake Bank*, 51 Md. 562; *Hatton v. Holmes*, 97 Cal. 208; *Frank v. Chemical Bank*, 84 N. Y. 209; *Georgia Banking Ass'n v. Love and Good Will Soc.*, 85 Ga. 293; *Leavitt v. Stanton, H. & D. Supp.* 413 (a very peculiar case).

¹³ *Crawford v. West Side Bank*, 100 N. Y. 50, is negligence in drawing the check as to form. *Smith v. Mechanics' Bank*, 6 La. Ann. 610, is negligence in delivering the check. But with the last case compare *Welsh v. Germ. Am. Bank*, 73 N. Y. 424. The use of a rubber stamp as a *fac simile* signature is not negligence unless it was negligently kept. *Robb v. Pennsylvania Co.*, 186 Pa. 456. But this proposition must be very carefully examined, because if, in spite of the depositor's antecedent negligence, the bank could have avoided the payment by the exercise of due care, the general rule (see note

14 to § 363, *post*) requires that the antecedent negligence of the depositor should be considered immaterial.

¹⁴ *Leather Manuf. Bank v. Morgan*, 117 U. S. 96; *Janin v. London Bank*, 92 Cal. 14; *Dana v. Nat. Bank of Republic*, 132 Mass. 156; *Weinstein v. National Bank*, 69 Tex. 38; *Hardy v. Chesapeake Bank*, 51 Md. 562; *Wind v. Fifth Nat. Bank*, 39 Mo. App. 72; *First Nat. Bank v. Allen*, 100 Ala. 476; *Am. Nat. Bank v. Bushey*, 45 Mich. 135. But this rule is strenuously denied in New York. *Welsh v. Germ. Am. Bank*, 73 N. Y. 424; *Frank v. Chemical Bank*, 84 N. Y. 209; *Shipman v. State Bank*, 126 N. Y. 318 (the last was a very hard case).

¹⁵ *Hardy v. Chesapeake Bank*, 51 Md. 562.

¹⁶ *Dana v. National Bank*, 132 Mass. 156.

forgery to his employer or in not notifying the bank to put him in the penitentiary.¹⁷ But, nevertheless, the bank must show that it has suffered loss,¹⁸ and, in reason, the depositor ought to be held only to the amount of that loss.¹⁹ A part of the depositor's duty is to return at once the forged check to the bank. If he holds it after knowledge of the forgery he ratifies the bank's act,²⁰ unless it is done at the bank's request.²¹ The next case to consider is where the indorsement on the check is forged. As to this matter the bank owes a duty only to its depositor.²² All other people through whose hands the check passes have an equal opportunity with itself of discovering such a forgery. Therefore, if the bank pays a check which contains a forged indorsement, it may collect the amount paid from the person to whom it was paid.²³ If that person were innocent, there was a mutual mistake. If he knew of the forgery he was guilty of fraud, and the same rule exactly applies to the certification of a check.²⁴ The bank by its certification does not in any sense warrant the indorsement upon the paper or check which it certifies. Its liability is confined to the signature of the depositor in the bank, which would be, of course, the first indorsement on a certificate of deposit.²⁵ Now as to a forged

¹⁷ *First Nat. Bank v. Allen*, 100 Ala. 476. This rule seems strange, but it is sound. See note 18 to § 111, *ante*. *Contra*, *Weisser v. Denison*, 10 N. Y. 68.

¹⁸ *Janin v. London Bank*, 92 Cal. 14.

¹⁹ *Brixen v. Deseret Nat. Bank*, 5 Utah, 504.

²⁰ *Van Wert Nat. Bank v. First Nat. Bank*, 6 Ohio Cir. Ct. R. 130.

²¹ *Brixen v. Deseret Nat. Bank*, 5 Utah, 504.

²² *Crawford v. West Side Bank*, 100 N. Y. 50.

²³ *Espy v. Bank of Cincinnati*, 18 Wall. 605; *Corn Exchange Bank v. Nassau Bank*, 91 N. Y. 74. *Contra*,

Merchants' Bank v. Marine Bank, 3 Gill, 96. But where the payment is made upon an indorsement of a fictitious name assumed by the person intended, there is no forgery; it is otherwise if the indorser personates a real person. *First Nat. Bank v. Farmers' Bank*, 76 N. W. R. 430. See note 5 to § 204, *post*.

²⁴ *Meads v. Merchants' Nat. Bank*, 25 N. Y. 143; *Irving Bank v. Wetherald*, 36 N. Y. 335.

²⁵ See note 32 to this section. This statement in the text must be understood with the qualification that the bank itself has done nothing to mislead the person to whom it paid or gave its certification.

indorsement, the bank cannot charge such a check against the depositor if it pays it;²⁶ and the situation is different as to the duty of the depositor. While he is under the duty of examining returned vouchers, he is not expected to discover a forged indorsement.²⁷ If he finds a forgery he should within a reasonable time notify the bank, and his failure to do so, if it causes injury to the bank, may be charged against him as a failure of duty.²⁸ The depositor in some cases has been said to be bound by a forged indorsement, where he has himself been guilty of negligence in not taking care as to the payee,²⁹ but this statement is not true. There must be an estoppel.³⁰ The last case to be considered is that of forged or altered paper, where the amount has been raised. It is necessary to consider first the case of certification and next the case of payment. The alteration may be made either before or after certification. If made before certification, the bank by its certificate simply warrants that the

²⁶ See note 12 to this section.

²⁷ *Brixen v. Deseret Nat. Bank*, 5 Utah, 504. But the bank must discover forged indorsements as against its depositor. *Bank of British North America v. Merchants' Nat. Bank*, 91 N. Y. 106; *Citizens' Nat. Bank v. Importers' & Traders' Bank*, 119 N. Y. 195. The fact that the last indorsement was good is immaterial. *Atlanta Nat. Bank v. Burke*, 81 Ga. 597. The bank need not regard the handwriting of the body of the check. *Crain v. Horton*, 5 Wash. 479.

²⁸ *United States v. National Ex. Bank*, 45 Fed. R. 163. But if the bank's officers could have detected the forgery before payment, the depositor's negligence is immaterial. *Bank v. Morgan*, 117 U. S. 112. As to what is a reasonable time, see *Cooke v. United States*, 91 U. S. 389, 402.

²⁹ *Armstrong v. Pomeroy Nat.*

Bank, 46 Ohio St. 512. Compare *Burnet Co. v. German Nat. Bank*, 4 Ohio Dec. 290; *De Feriet v. Bank of America*, 23 La. Ann. 310; *Hardy v. Chesapeake Bank*, 51 Md. 562; *Mackintosh v. Eliot Bank*, 123 Mass. 393; *Dana v. National Bank of Republic*, 132 Mass. 146; *Robb v. Pennsylvania Co.*, 186 Pa. 456.

³⁰ *Welch v. German-American Bank*, 73 N. Y. 494. Compare *Goetz v. Bank*, 119 U. S. 560. It is difficult to see how the antecedent conduct of the drawer is material, unless it amounts to a representation of a fact or a concealment of the truth. Otherwise it has no causal connection with the bank's neglect. See the last note and *National Bank v. Nolting*, 94 Va. 263. The depositor ought always to be permitted to assume that the bank will pay only on a genuine signature. See *Dodge v. Bank*, 30 Ohio St. 1, 20 id. 234.

drawer's signature is genuine and that he has funds. It does not warrant the amount of the check to be correct.³¹ Therefore the bank is not bound to even a *bona fide* holder upon its certificate, if it acts in good faith.³² It need not revoke the certificate, because it cannot be held on it; yet banks often take precautions to warn the public and other banks against forgeries and altered paper.³³ But the law, while it does not hold the banker liable in any case upon the certificate as a contract, where paper is raised before certifying, nevertheless holds every man to fair and honest dealing towards others, so far as such dealing can be brought within legal principles. Therefore, if the certifying bank acted with such culpable negligence in not ascertaining facts which would have indicated to it the forgery that its conduct amounts to bad faith, it will be held upon its certificate. The court puts it upon the ground of negligence, but it is more consonant with legal conceptions to call it estoppel.³⁴ If the alteration is made after the certificate was given (the drawer, of course, having the right to change the payee before he delivers the check),³⁵ it is not liable upon the certificate,³⁶ or at any rate for not more than the check originally was,³⁷ and on principle, if it pay the check without being at fault, it may recover from the payee,³⁸ although the

³¹ *Clews v. Bank of New York*, 89 N. Y. 418; *Parke v. Roser*, 67 Ind. 500; *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296 (as to the certificate being a warranty only of the signature of the drawer and the presence of funds); *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67; *Espy v. Cincinnati Bank*, 18 Wall. 605.

³² *Clews v. Bank of New York*, 89 N. Y. 418. Custom is not admissible to charge the bank. *Security Bank v. Nat. Bank of Republic*, 67 N. Y. 458.

³³ See *Hagan v. Bowery Nat. Bank*, 64 Barb. 197.

³⁴ *Clews v. Bank of New York*, 105 N. Y. 398, 114 N. Y. 70. Teller who says his own forged certificate is good binds the bank. *Continental Bank v. Commercial Bank*, 50 N. Y. 575.

³⁵ *Abrams v. Union Nat. Bank*, 31 La. Ann. 61.

³⁶ *Clews v. Bank of New York*, 105 N. Y. 398, 114 N. Y. 70.

³⁷ *Merchants' Bank v. Exchange Bank*, 16 La. 457.

³⁸ *Redington v. Woods*, 45 Cal. 406; *Parke v. Roser*, 67 Ind. 500; *Espy v. Cincinnati Bank*, 18 Wall. 605; *Corn Ex. Bank v. Nassau Bank*, 91 N. Y. 74. See note 23, *ante*.

cases are not consistent in their language.³⁹ But there are cases which hold the bank liable where its own negligence gave an opportunity for the raising of the check.⁴⁰ It will be seen that in some cases the bank, even if it has paid a check that has been raised, may charge it against the depositor.⁴¹ Therefore, if it can charge the check against the depositor, where the alteration was made before certifying, the bank ought to be bound to make the certificate good to the holder, because the check has actually become genuine.⁴² The same rules exactly apply to payment. A certified check, when paid, is paid as the obligation of the bank, not of the drawer. Therefore the depositor is not concerned with an alteration which took place after certifying. He was no longer a party to the contract. It has already been stated that the bank paying without fault on its part a certified check, whether raised before or after certifying, may recover of the person to whom it paid.⁴³ If it pay an uncertified raised check without fault on its part it may recover of the last payee,⁴⁴ unless it can charge the check against the depositor, when in justice it ought not to recover against the payee.⁴⁵ The bank, as a general rule, cannot charge forged paper altered as to amount against the depositor. But where the depositor has been guilty of negligence in so drawing the check as to facilitate the forgery, the bank may charge the check against its depositor.⁴⁶ What would be negligence in the

³⁹ *National Bank of Commerce v. National Mechanics' Banking Ass'n*, 55 N. Y. 211, seems to qualify the right upon the holder not having suffered injury. But the bank, it is said, must have paid without negligence. *Redington v. Woods*, 45 Cal. 406.

⁴⁰ *Helwege v. Hibernia Nat. Bank*, 28 La. Ann. 520; *Godchaux v. Union Nat. Bank*, 28 La. Ann. 516. This is the rule as to the drawer of the check.

⁴¹ See note 46 to this section.

⁴² See note 8 to this section.

⁴³ See note 38 to this section.

⁴⁴ See note 38 to this section. *Merchants' Bank v. Exchange Bank*, 16 La. 457. This rule as to an uncertified check must be governed by the same qualification as to the bank's exercise of due care in payment that is made in *Redington v. Woods*, 45 Cal. 406. This qualification holds as between banks. See note 1 to next section.

⁴⁵ See note 8 to this section.

⁴⁶ *Crawford v. West Side Bank*, 100 N. Y. 50.

depositor will necessarily be a difficult question to solve.⁴⁷ But the bank's contributory negligence ought to be a complete defense.⁴⁸ The reason of this rule is that the bank was guilty of the last clear act of negligence without which the payment would not have been made. The negligence of the depositor after payment in failing to examine the vouchers, or to compare the amounts of the checks as drawn with the checks returned, may amount to a ratification or an implied admission,⁴⁹ for the depositor can always be expected to know the amounts of the checks which he has drawn.

§ 155. Forged paper as between banks.—The rule that payment by a bank of a check drawn on itself, where the drawer's name is forged, does not obtain as between banks. The rule is said to be by courts of not the highest authority that the first bank indorsing the check guarantees the signatures on the check, including the maker's.¹ It is impliedly decided in other cases, but this particular language is not used.² But if the second bank is guilty of negligence,³ or of

⁴⁷ See note 27 to this section, and *Crawford v. West Side Bank*, *supra*.

⁴⁸ *Leather Mfg. Bank v. Morgan*, 117 U. S. 96. The statement in the text is what the case meant to decide, but in the case before it the court was concerned with the negligence of a depositor subsequent to the payment. As to that negligence the antecedent negligence of the bank would be immaterial, but as this case stands it is an authority to the contrary.

⁴⁹ See notes 14, 18, 19, 20, *ante*, to this section.

¹ *First Nat. Bank v. Northwestern Nat. Bank*, 40 Ill. App. 640; *First Nat. Bank v. First Nat. Bank*, 4 Ind. App. 355; *Indiana Nat. Bank v. First Nat. Bank*, 9 Ind. App. 185. The first case on appeal (152 Ill. 296) was not affirmed as to this point, the court saying, the indorse-

ment having been forged, the forgery of the drawer's name was immaterial. Custom may be admitted to prove this rule. *Ellis v. Ohio Life Ins. Co.*, 4 Ohio St. 628. But if the paying bank was negligent it cannot recover. *First Nat. Bank v. First Nat. Bank*, 58 Ohio St. 207. Cases seemingly *contra* to the text are *Deposit Bank v. Fayette Nat. Bank*, 90 Ky. 10; *Comm. Nat. Bank v. First Nat. Bank*, 30 Md. 11, and *Northwestern Nat. Bank v. Bank of Commerce*, 107 Mo. 402.

² *First Nat. Bank v. First Nat. Bank*, 151 Mass. 280; *Third Nat. Bank v. Allen*, 59 Mo. 310; *First Nat. Bank v. State Bank*, 22 Neb. 769; *State Nat. Bank v. Freedman's Sav. Bank*, 2 Dill. 11.

³ *Salt Springs Bank v. Syracuse Sav. Inst.*, 62 Barb. 101.

a delay which caused injury,⁴ the indorsing bank will not be liable to it.⁵ If the paper is a forgery owing to a forged indorsement, or to the amount being altered, the first bank indorsing the paper is liable to the other banks taking the paper or paying it.⁶ The reason of this rule is so plain that it needs no comment. It is said, however, that if the second bank is guilty of negligence or delay in reporting the forgery or negligence in discovering such a forgery, the indorsing bank will be exonerated.⁷ But this statement is strenuously denied by very high authority.⁸ But where the statute requires diligence to be shown, the failure to exhibit such diligence by the second bank will be a defense as to the bank first indorsing the paper.⁹ The real ground of recovery is upon the indorsement or receipt of the money, but some courts lay stress upon the indorsing bank's negligence.¹⁰ The rules of the clearing-house are binding upon banks settling accounts by that medium,¹¹ so far as the rule extends, even upon forged paper.

§ 156. Lost or stolen checks or certificates.—The bank takes the risk as to the ownership of stolen or lost paper not negotiable. If it pay such paper upon forged indorsements

⁴ First Nat. Bank v. First Nat. Bank, 151 Mass. 280, *semble*; Third Nat. Bank v. Central Nat. Bank, 76 Hun, 475, *semble*.

⁵ Some cases put the right of recovery upon the ground of the first bank's negligence. First Nat. Bank v. First Nat. Bank, 151 Mass. 280; People's Bank v. Franklin Bank, 88 Tenn. 299. But see Comm. Nat. Bank v. First Nat. Bank, 30 Md. 11. The basis of the rule ought to be that the bank first receiving a check ought to be compelled to verify the various indorsements. See also Van Wert Nat. Bank v. First Nat. Bank, 6 Ohio Cir. Ct. R. 130; Allen v. Fourth Nat. Bank, 59

N. Y. 12; Bank of Com. v. Grocers' Bank, 2 Daly, 289.

⁶ Corn Exchange Bank v. Nassau Bank, 91 N. Y. 74; First Nat. Bank v. Northwestern Nat. Bank, 152 Ill. 296; Central Nat. Bank v. North River Bank, 44 Hun, 114.

⁷ Bank of St. Albans v. Farmers' Bank, 10 Vt. 141.

⁸ Corn Ex. Bank v. Nassau Bank, 91 N. Y. 74.

⁹ Corn Ex. Bank v. Nat. Bank of Republic, 78 Pa. 233; Iron City Nat. Bank v. Fort Pitt Nat. Bank, 159 Pa. 46.

¹⁰ See note 5, *ante*, to this section.

¹¹ Preston v. Canadian Bank, 23 Fed. R. 179. But if the clearing-

it does it at its peril.¹ Even though the stealing and forging be done by a clerk² or a messenger³ of the depositor, where the depositor has not been guilty of negligence, the bank cannot charge the check, when paid, against the depositor. But where the depositor has been guilty of negligence in leaving the paper in negotiable form, he will be liable to the bank.⁴ The situation of the payee of stolen or lost paper, if not negotiable in form, is the same as if it were forged paper. The same rules precisely ought to govern as to certifying or paying such paper, whether as between the depositor and the bank or the bank and third parties. As between two banks, the same rules ought to govern as obtain in the case of forged paper. The principle is impliedly laid down in a case where stolen paper indorsed by a forged signature was paid by the bank on which it was drawn to another bank. The first bank was held entitled to recover from the second.⁵ Certificates of deposit when indorsed are negotiable. But where they are unindorsed they are not negotiable, and the owner may recover the amount of them from the bank without giving security.⁶ The situation of overdue certificates of deposit would be the same.⁷ A certified check, payable to order, unindorsed, ought to be subject to the same rule as certificates of deposit unindorsed. An unaccepted check, payable to order, if lost can be stopped, either by the drawer or payee, and the payee of a certified check may stop it. But a certified check payable to bearer or generally indorsed

house rule has been violated, the case is to be determined under the general rules of law as if there were no rule. *National Bank v. Bangs*, 106 Mass. 441. See § 368, *post*.

¹ *Belknap v. National Bank*, 100 Mass. 376; *First Nat. Bank v. Bremer*, 7 Ind. App. 685.

² *Belknap v. National Bank*, *supra*.

³ *Bristol Knife Co. v. First Nat. Bank*, 41 Conn. 421. There was no forgery in this case.

⁴ *Bowden v. Third Nat. Bank*, 12 Wkly. Law Bul. 184.

⁵ *State Nat. Bank v. Freedmen's Sav. Bank*, 2 Dill. 11.

⁶ *Citizens' Bank v. Brown*, 45 Ohio, St. 39; *National Bank v. Ringel*, 51 Ind. 393. In this case a certificate payable in current funds is said not to be payable in money.

⁷ *Citizens' Nat. Bank v. Brown*, 11 Wkly. Law Bul. 220, at the end of the opinion recognizes this principle, but the syllabus does not contain a reference to this holding.

is negotiable, and a *bona fide* holder thereof has a good title, even though he gain it from a thief.

§ 157. Overpayment and wrongful payment.—If a bank overpays a check it may recover from the person to whom it paid.¹ If the bank pays the check to the wrong person, that is to say, a person who cannot claim that he had any authority to receive the money, the bank may recover the amount paid, or, if the bank pays money to a person who is charged with notice that he has no right to receive the money, the bank may recover.² In two preceding sections³ has been discussed the bank's right upon payment of forged or-altered paper. But if the payee of a check has no notice of any want of authority in himself to receive the money, and the check is a proper and genuine check, the bank cannot recover from him, even though the bank had no authority to pay the money.⁴ But if the bank pays a check to the wrong person, the depositor gains no right to sue that person,⁵ nor does the person to whom the check was properly payable gain any right to sue the person to whom the check was paid,⁶ nor, as we have already seen, can he sue the bank.⁷ He must rely upon the drawer.

§ 158. Effect of payment.—In all cases where a bank pays a genuine check drawn upon itself to the person entitled thereto¹ (except in the single case of another bank²), but not

¹ Keene v. Collier, 1 Met. (Ky.) 415. The amount of recovery is the amount paid less the check. As between banks in those states which recognize the right of one bank to recover from another bank a payment without funds, the amount of recovery is the check less the deposit. Merchants' Nat. Bank v. National Bank of Com., 139 Mass. 513.

² The bank may pursue the diverted funds until they come to a *bona fide* holder. Anderson v. Kism, 35 Fed. R. 699; Beard v. Lamson, 94 Fed. R. 30.

³ See §§ 154, 155, *ante*.

⁴ Manufacturers' Nat. Bank v. Swift, 70 Md. 515. It seems that statements on the check do not bind the payee. Citizens' Bank v. Grand, 33 La. Ann. 976.

⁵ Davis v. Smith, 29 Minn. 201.

⁶ Unless the funds were a trust for the holder.

⁷ See § 146, note 7.

¹ See United States v. Nat. Ex. Bank, 45 Fed. R. 163. The person entitled is the person intended by the drawer.

² As between banks such payment

perhaps where it certifies such a check,³ or where a bank pays to the proper person a genuine note upon its depositor payable at the bank,⁴ the payment is final and cannot be rescinded,⁵ except for fraud, as, for example, in obtaining an overdraft⁶ participated in by the payee.

§ 159. Liability of the bank for interest.—A general deposit in a bank, except by agreement, does not draw interest, general deposits being always subject to check.¹ A certificate of deposit does not draw interest,² and no liability is imposed upon the bank to pay interest either upon general deposits or certificates of deposit; but the bank by agreement, either written or verbal, may bind itself to pay interest upon general deposits;³ but it would seem that a certificate of deposit, being a written contract, must on its face determine whether it is to draw interest or not. A verbal agreement, proven as a part of the written document, would fall within the inhibition against parol evidence to add to or contradict the terms of a written document.

is not final. *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281; *National Ex. Bank v. National Bank*, 132 Mass. 147; *Merchants' Nat. Bank v. National Bank of Com.*, 139 Mass. 513. But see *Preston v. Canadian Bank*, 23 Fed. R. 176.

³ See § 150, *ante*.

⁴ *Riverside Nat. Bank v. First Nat. Bank*, 74 Fed. R. 276.

⁵ *Riverside Nat. Bank v. First Nat. Bank*, *supra*; *Boylston Nat. Bank v. Richardson*, 101 Mass. 287; *First Nat. Bank v. Ricker*, 71 Ill. 439; *Bank of U. S. v. Bank of Georgia*, 10 Wheat. 333; *Hull v. State Bank*, *Dud. Law*, 259. For other authorities, see § 133, *ante*, note 8. But a mistaken credit and remittance recovered from the postoffice is not payment. *Carley v. Potters' Bank*, 46 S. W. R. 328.

⁶ *Tradesmen's Bank v. Merritt*, 1 Paige, 302.

¹ *Parsons v. Treadwell*, 50 N. H. 356; *Atlanta Nat. Bank v. Burke*, 81 Ga. 597; *Cohn v. St. Louis Ins. Co.*, 11 Mo. 374. But it is said that a bank is liable for interest on every deposit not subject to check. *Parkersburg Nat. Bank v. Als*, 5 W. Va. 50. But as to deposits in court, see *Insurance Co. v. National Bank*, 93 Ky. 129, which holds they draw interest. *Contra*, *Haswell v. Mechanics' Bank*, 26 Vt. 100.

² See *Parsons v. Treadwell*, 50 N. H. 356. If the certificates are not paid on maturity, and are interest bearing, they so continue without a demand. *Payne v. Clark*, 23 Mo. 259; *Cordell v. First Nat. Bank*, 64 Mo. 600.

³ *Pelham v. Adams*, 17 Barb. 384. See *McLochlin v. Bank*, 139 N. Y. 514.

Whether a custom would be admissible to charge the bank with interest may be a matter of some doubt, but the better reason would be that it would be admissible. As in the case of other obligations payable upon demand, bank deposits or demand certificates of deposit⁴ begin to draw interest from the date of the demand,⁵ or the date when a demand was rendered useless by the suspension of the bank.⁶ The bringing of suit is a demand,⁷ and so is the claim of set-off by way of defense or affirmative relief.⁸ If a bank refuses to pay upon garnishment, it will become liable for interest; this result could be avoided by payment into court.

§ 160. Overdrafts.—In connection with the criminal liability of officers, we have already discussed to some extent the question of overdraft.¹ In connection with the bank's right to refuse payment of a check, the question was incidentally considered. It should be noted that the officer of the bank has no right to permit an overdraft, unless the board of directors give him that authority, either expressly or by permitting him to allow it by a course of dealing. But the board of directors can permit an overdraft if they please. The rule is that the state of the depositor's account is to be determined by its true condition, not necessarily by what is shown on the books.² An overdraft arises whenever the bank pays upon a depositor's checks more money

⁴ *Morse v. Rice*, 36 Neb. 212; *Citizens' Nat. Bank v. Brown*, 45 Ohio St. 39.

⁵ If the liability is dependent on a condition, default after condition performed determines the liability for interest. *Cooper v. Townsend*, 13 N. Y. Supp. 760. A refusal to pay on a garnishment will create a liability to pay interest. *Jones v. Manufacturers' Bank*, 10 Wkly. Notes Cas. 102. But see *Comm. Bank v. Jones*, 18 Tex. 81.

⁶ *McGowan v. McDonald*, 111 Cal. 57.

⁷ *Watson v. Phoenix Bank*, 8 Met. 217. Even though bank enjoined afterwards.

⁸ *Sickles v. Herold*, 149 N. Y. 332.

¹ See § 92, *ante*, especially notes 14-18.

² *Merchants' Nat. Bank v. Nat. Bank of Com.*, 139 Mass. 513; *Ain. Ex. Nat. Bank v. Gregg*, 138 Ill. 596; *McLean Co. Bank v. Mitchell*, 88 Ill. 52. If *Munn v. Burch*, 25 Ill. 35, had recognized this ruling, there would have been no necessity for a ruling which has produced so much error.

than the amount of his deposit.³ It makes no difference whether this overpayment is guaranteed or not,⁴ or whether an indorsement be required by the bank upon the check.⁵ But if the depositor is given a credit at the bank in such a form, whether it be entered upon the books or not, that the depositor could sue the bank for dishonoring a check drawn upon the credit, then such a credit ought not to be called an overdraft, because there is no overdrawing of the account.⁶ The depositor has so much credit given to him at the bank, and the result is precisely the same as if he went to the bank and made a deposit of so much money, although it may very well be that if the bank should promise the holder of a check to accept it, the promise would be a *nudum pactum*, if the drawer had no funds.⁷ The promise to the depositor, in the case we are considering, is performed by loaning him the money, and the reciprocal promise of the depositor to pay the loan makes a perfectly good contract. Therefore the term "overdraft" cannot with any propriety be applied to such a credit.⁸ Every man who overdraws his

³ United States v. Allis, 73 Fed. R. 65. There is no division as to the definition. The difficulty is in determining the amount of the deposit.

⁴ Low v. Taylor, 41 Mo. App. 517.

⁵ Marine Bank v. Butler Colliery Co., 5 N. Y. Supp. 291, 125 N. Y. 695.

⁶ See § 92, *ante*. This is the result implied from the language of the court in *Graves v. United States*, 165 U. S. 323. If a bank makes a naked agreement with a depositor to pay his overdrafts in consideration of the depositor agreeing to pay thereon a certain rate of interest, there is simply a verbal permission to overdraw. If the depositor executes a demand note for a certain sum, and the bank agrees to let the depositor overdraw up to the amount of the demand note,

there is also a loan, but it is a loan which goes to the credit of the depositor, and he does not overdraw his account. The transaction does not differ in the least from one where the depositor discounts his note and deposits the amount realized in the bank.

⁷ *Morse v. Mass. Nat. Bank*, 1 Holmes, 209. But it has been held that a promise to pay checks made to drawer communicated to the seller is binding upon the bank. *Nelson v. First Nat. Bank*, 48 Ill. 36. See § 146, *ante*, note 10, and *Kollock v. Enmert*, 43 Mo. App. 566.

⁸ But *United States v. Allis*, 73 Fed. R. 165, holds quite confused language upon this point, and *Bacon v. United States*, 97 Fed. R. 35, is hopelessly confused. This late case holds that though a depositor

account at the bank, by the fact of overdrawing agrees to repay the amount upon demand.⁹ But when a check is paid by a bank it is *prima facie* proof of a previous deposit to that amount,¹⁰ and other proof than the checks is needed to show the fact of overdraft.¹¹ If the overdraft, or rather the right to overdraw, is granted by competent authority, to wit, by the board of directors or by some officer to whom the board by express authority or by acquiescence has granted the right to allow an overdraft, the overdrawing is not a fraud. But if the overdrawing be done without authority it is fraudulent, and no title in the money drawn passes except to a payee who is in good faith. If the overdraft is obtained by fraud from the bank, if it be a fraud in which the payee of the check can be held to have participated, the bank does not lose title to the money paid out, but may follow it into a credit in another bank.¹² But a person who merely acted in cashing a check without any participation in the overdraft or any interest in the check is not liable to the bank.¹³ If the overdrawn depositor makes a general deposit it will be supposed to be in payment *pro tanto* of the overdrawn account;¹⁴ yet government deposits for particular purposes known to the bank cannot be applied upon other

who has executed a demand note and had received a credit to the amount of the demand note, up to which he has the right to draw, is nevertheless overdrawing his account, because his note is not discounted. But the apparent state of the account is a mere matter of book-keeping. The books do not and cannot show the credit, yet the depositor undoubtedly had it. This opinion represents the judicial superstition that the only way in which a bank can loan money is by discounting.

⁹ Thomas v. Intern. Bank, 46 Ill. App. 461; Franklin Bank v. Byram,

39 Me. 489. Compare Lancaster Bank v. Woodward, 18 Pa. 357.

¹⁰ Bank of U. S. v. Wilson, 3 Cranch, C. C. 213.

¹¹ State Bank v. Clark, 8 N. C. 36.

¹² Tradesmen's Bank v. Merritt, 1 Paige, 302.

¹³ Savings Bank v. Hubbard, 58 N. H. 167.

¹⁴ Nichols v. State, 46 Neb. 715. It seems that the bank may agree to receive what it knows is public money to pay the officer's private overdraft, and be bound by the agreement. Hale v. Richards, 80 Iowa, 164. But if the public sued the bank for the money it would have no defense.

accounts.¹⁵ This same rule has been applied in the case of a private depositor with two different accounts, but both belonging to him.¹⁶ But in the nature of things this rule cannot be correct, unless the deposits were held by the depositor in different rights, one for himself and the other for some one else.¹⁷ In other cases if a deposit is made to a particular account it is really immaterial whether the bank places the deposit to the particular account indicated and immediately charges it to balance another account, or places it to the credit of the second account in the first instance. If the overdraft is obtained, the depositor cannot refuse to pay because the cashier had no power to allow it.¹⁸ An overdraft once permitted to be made cannot be revoked by the bank as to another bank, the payee of a check, except under a clearing-house rule.¹⁹ An overdraft does not draw interest except by agreement²⁰ or custom,²¹ or after demand for payment or rendition of an account,²² or where the overdraft was wrongfully obtained.²³

§ 161. Certificates of deposit.—The power of a bank to issue certificates of deposit is a part of the power to carry

¹⁵ *United States Bank v. Macalister*, 9 Pa. 475.

¹⁶ *Simmons Co. v. Bank of Greenwood*, 41 S. C. 177: This was a case where the check-holder sued, and is another of the astonishing decisions produced by this extraordinary rule. The decision held that the balance of one account could not be applied upon another account without notice to the depositor. But the decision gives no idea of the real issue. As a matter of fact the account was insufficient including both accounts. The case went to the jury on the theory that the bank was estopped by its books. Yet the court charged exactly the other way. The whole case, when carefully examined, is incomprehensible.

¹⁷ In such a case the bank must respect the rights of the true owner or beneficiary, if it knows of the interest.

¹⁸ *Union Mfg. Co. v. Rocky M. Bank*, 2 Colo. 248.

¹⁹ *Preston v. Canadian Bank*, 23 Fed. R. 179. But this decision is hardly reconcilable with the *Massachusetts* case it cites. See § 158, *ante*, note 2.

²⁰ *Owens v. Staff*, 32 Ill. App. 653. If no rate is fixed the legal rate will govern. *Loan Bank v. Miller*, 39 S. C. 175.

²¹ This is within the general rule.

²² *Casey v. Carver*, 42 Ill. 225; *Union Bank v. Solee*, 2 Strobb. 390.

²³ *Hubbard v. Charleston Co.*, 11 Met. 124.

on a banking business. Therefore national banks have power to issue certificates of deposit payable either upon demand or upon time.¹ Sometimes, however, the statute has forbidden the issuance by banks of such paper;² yet even if the certificate itself be void as an illegal contract,³ the deposit will remain enforceable as a deposit.⁴ Such certificates issued without consideration are, like other contracts without a consideration to support them, of no efficacy,⁵ except in the hands of a *bona fide* holder.⁶ This latter statement is true if the particular jurisdiction holds in accordance with the great weight of authority that the ordinary certificate of deposit of a banker is the promissory note of the bank or banker issuing it, payable upon demand.⁷ But certain courts have denied this obvious proposition.⁸ The certificates are therefore negotiable,⁹ and an indorser upon one assumes the

¹ See notes 5 and 6, § 125, *ante*.

² *Darden v. Banks*, 21 Ga. 297; *Bank of Peru v. Farnsworth*, 18 Ill. 565. And see *Hunt v. Divine*, 37 Ill. 137, for a strict construction of such a statute.

³ *Bank of Peru v. Farnsworth*, *supra*; *Bank v. Merrill*, 2 Hill, 295; *Leavitt v. Palmer*, 3 N. Y. 19. Compare *Curtis v. Leavitt*, 17 Barb. 309. The case of *Hargroves v. Chambers*, 30 Ga. 580, is *contra*.

⁴ *Pelham v. Adams*, 17 Barb. 384. And see § 33, *ante*. Where the statute requires all contracts of the bank to be signed by both president and cashier, a certificate signed by either is good. *Kilgore v. Bulkley*, 14 Conn. 362; *Barnes v. Ontario Bank*, 19 N. Y. 152.

⁵ *Murray v. Pauly*, 56 Fed. R. 962. But see *Armstrong v. Am. Ex. Nat. Bank*, 133 U. S. 433. Compare *Holland Trust Co. v. Waddell*, 75 Hun, 104; *Logan Nat. Bank v. Williamson*, 2 Ohio Cir. Ct. R. 118; *Citizens'*

Sav. Bank v. Blakeley, 42 Ohio St. 645.

⁶ *Kirkwood v. First Nat. Bank*, 40 Neb. 484; *First Nat. Bank v. Clark*, 42 Hun, 16. It is good though known to be for accommodation. *Holland Trust Co. v. Waddell*, *supra*.

⁷ *Miller v. Austen*, 13 How. 218; *Beardsley v. Webber*, 104 Mich. 88; *Brummagim v. Tallent*, 29 Cal. 503; *Kilgore v. Bulkley*, 14 Conn. 362; *Swift v. Whitney*, 20 Ill. 144; *Curran v. Witter*, 68 Wis. 16; *Mitchell v. Easton*, 64 N. Y. 155; *Citizens' Bank v. Brown*, 45 Ohio St. 39, and many other cases.

⁸ *Shute v. Pacific Nat. Bank*, 136 Mass. 487; *Loudon Sav. Soc. v. Hagerstown Bank*, 36 Pa. 498; *Lebanon Bank v. Mangan*, 28 Pa. 452; *O'Neill v. Bradford*, 1 Pin. 390. The latter case is no longer authority.

⁹ *Miller v. Austen*, 13 How. 218; *Birch v. Fisher*, 51 Mich. 36; *Lynch v. Goldsmith*, 64 Ga. 42; *Springfield*,

same liability as the indorser of a promissory note.¹⁰ The certificate passes by indorsement and delivery,¹¹ or by delivery though unindorsed.¹² An assignment of the certificate transfers the whole sum represented by it.¹³ A certificate must be delivered up upon payment,¹⁴ unless it has been lost unindorsed.¹⁵ The certificate is payable where the bank is located,¹⁶ but one extraordinary case has lost sight of this obvious fact.¹⁷ Payment by the bank upon an unauthorized indorsement is not payment at all,¹⁸ even though the bank obtains the certificate. Yet it has been erroneously held that if the bank pay the certificate once it cannot be called upon after six years to pay it again, in spite of the fact that it did not get the certificate.¹⁹ This decision ignores the fact that the certificate is a promissory note and is entitled to no weight whatever.

Certificates of deposit are of two descriptions: those payable after a certain time and those payable upon demand. If a certificate is payable after a certain date it matures at that date, and becomes, so far as a transferee of the certificate after maturity is concerned, overdue paper, and is subject to defenses accordingly.²⁰ A demand certificate trans-

Marine Co. v. Peck, 102 Ill. 265; and under a statute, *Renfro v. Merchants' Bank*, 83 Ala. 425. But *contra* where payable in current funds not negotiable under a statute. *Lafayette Nat. Bank v. Ringel*, 51 Ind. 393.

¹⁰ *Cate v. Patterson*, 25 Mich. 191.

¹¹ See cases under notes 7 and 9, *supra*. *Contra*, cases under note 8, *supra*.

¹² *Shanklin v. Madison Co. Com'rs*, 21 Ohio St. 575; *Cassidy v. First Nat. Bank*, 30 Minn. 86.

¹³ *Springfield Marine Co. v. Peck*, 102 Ill. 265.

¹⁴ *Fells Point Sav. Inst. v. Werdon*, 18 Md. 320. But *Hunt v. Divine*, 37 Ill. 137, permits a suit without de-

mand, and an injunction forbidding a transfer was held to be good as against every one except a *bona fide* holder. *Springfield Marine Co. v. Peck*, 102 Ill. 265.

¹⁵ See note 6 to § 156, *ante*.

¹⁶ *Sanbourn v. Smith*, 44 Iowa, 152.

¹⁷ *Renfro v. Merchants' Bank*, 83 Ala. 425.

¹⁸ *Honig v. Pacific Bank*, 73 Cal. 464.

¹⁹ *Gregg v. Union Co. Nat. Bank*, 87 Ind. 238.

²⁰ *First Nat. Bank v. Security Nat. Bank*, 34 Neb. 71. But the certificate does not mature for the purpose of presenting it and demanding payment at the place where payable. It was upon this theory

ferred two years after its date is said to be subject to a set-off.²¹ The certificate is governed by the general rule that the figures in the margin are governed by the amount stated in the body of the certificate.²² Where a certificate was made payable to the order of the depositor or his wife by name, the bank was held liable for paying after his death upon the indorsement of the widow.²³ The certificate continues to draw interest at the same rate after maturity as before,²⁴ whether the certificate so states or not.²⁵ The damages for the detention of a non-interest bearing certificate are interest at the legal rate.²⁶ If a suit is pending upon a certificate and a new certificate is accepted instead of the one on which suit is pending, the cause of action is destroyed.²⁷ It is sometimes difficult to decide whether a document is a certificate of deposit or not,²⁸ as the cases show.

§ 162. Special deposits.—The words “special deposit” are used in the cases in two senses—one, as a deposit for safe-keeping; the other, as a deposit for a particular purpose. The latter kind of a deposit has been already noticed.¹ It

that banks tried to establish the rule that an unpresented certificate ceased to draw interest after maturity. Being payable at the bank, the need of demand there of payment could only be met by presenting the certificate at the bank for payment. It must be admitted that there is no logical escape from the claim made by the banks, but the decisions are all otherwise.

²¹ *Tripp v. Curtenius*, 36 Mich. 494. This decision would be correct if an assignee or indorsee were not *bona fide*; but the case in the last note is not sound, and *National Bank v. Washington Co. Bank*, 5 Hun, 605, is *contra*. It is difficult to see how the bank gets an equity by paying to the wrong person.

The rule as to certified checks is different from the rule stated in *Gregg v. Union Co. Nat. Bank*, *supra*.

²² *Payne v. Clark*, 19 Mo. 152.

²³ See *Smiley v. Fry*, 100 N. Y. 262; *First Nat. Bank v. Clark*, 134 N. Y. 368; *First Nat. Bank v. Greenville Nat. Bank*, 84 Tex. 40.

²⁴ *Second Nat. Bank v. Wrightson*, 63 Md. 81.

²⁵ *Cordell v. First Nat. Bank*, 64 Mo. 600.

²⁶ *Payne v. Clark*, 23 Mo. 259.

²⁷ *Sleppy v. Bank of Commerce*, 17 Fed. R. 712.

²⁸ *Manuel v. Mississippi R. Co.*, 2 Pa. 198.

¹ See § 136, *ante*, and notes 14 and 15; *Moreland v. Brown*, 86 Fed. R. 257; *Montague v. Pacific Bank*, 81

remains to be said that certifying a check does not create such a deposit.² A deposit to pay a certain claim is revocable unless assented to or acted upon by the beneficiary,³ and such a deposit remains a special deposit, although mingled with the general funds of the bank;⁴ but where a corporation agreed to keep its general deposit up to a certain amount in order to protect certain loans, the deposit was general and not special.⁵ But a deposit has been held in one case to remain special, although upon its credit checks were drawn and paid.⁶ Money delivered to a bank for transmission,⁷ or paid to a bank for a note upon an order given for delivery of the note,⁸ or for any other special purpose,⁹ is a special deposit. But where the bank agreed to put a special amount in a separate package, but did not do so, no special deposit resulted;¹⁰ although had the bank done so, a special deposit would have been created.¹¹ Paper delivered to a bank for collection, as we have seen, remains a special deposit as to that bank and all others with notice, until it is collected and the proceeds become mingled with the bank's funds.¹² The other cases of special deposit are where either money or securities or other valuables are delivered to a bank for safe-keeping.¹³

Fed. R. 602; *Am. Ex. Nat. Bank v. Loretta Mfg. Co.*, 165 Ill. 103.

² *People v. St. Nicholas Bank*, 28 N. Y. Supp. 407.

³ See § 136, *ante*, and notes 14 and 15; *Star Cutter Co. v. Smith*, 37 Ill. App. 212; *Bank of Leroy v. Harding*, 1 Kan. App. 389.

⁴ *Kimmel v. Dickson*, 5 S. D. 221; *Star Cutter Co. v. Smith*, 37 Ill. App. 212. This matter becomes of importance in case the bank is robbed or in the case of insolvency. See § 342, *post*. But the depositor in a case of robbery ought to ratify the mingling and claim a general deposit.

⁵ *State Building Ass'n v. Merch. Sav. Bank*, 36 S. W. R. 967.

⁶ *Chesapeake Bank v. Swain*, 29 Md. 483, an extreme case.

⁷ *Stoller v. Coates*, 88 Mo. 514.

⁸ *Massey v. Fisher*, 62 Fed. R. 958; *Clots v. Dickson*, 5 Alb. Law J. 286; *Peak v. Ellicott*, 30 Kan. 156; *Ellicott v. Barnes*, 31 Kan. 170; *Ryan v. Phillips*, 3 Kan. App. 704.

⁹ *Harrison v. Smith*, 83 Mo. 210. But see *Edson v. Angell*, 58 Mich. 336 (wrong).

¹⁰ *Bayer v. Shaffner*, 51 Ill. App. 180.

¹¹ *In re Comm. Bank*, 2 Ohio Dec. 304.

¹² See § 133, *ante*.

¹³ *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82. See *Kupfer v. Bank of Galena*, 34 Ill. 328. Though a de-

§ 163. When special deposit created.—A special deposit is created, in addition to the cases stated in the preceding section, whenever a particular thing is delivered to a bank to be returned *in corpore* upon demand.¹ But if a note is merely delivered to a bank without any direction to or agreement by the bank, the bank is at liberty to either discount the note or hold it for collection at maturity.² The fact that a credit in a pass-book is marked as a special deposit is not conclusive, it may be shown to have been general.³ Certificates of deposit, or certified checks, are not special but general deposits,⁴ and every deposit of money is general unless expressly made special or deposited in some particular way.⁵ Money deposited to indemnify the bank for its liability in becoming surety upon a bond is general where a certificate of deposit was issued and the money, to the knowledge of the depositor, went into the general funds of the bank;⁶ but where the depositor did not know the bank was treating such a deposit as a general one, it remains a special deposit.⁷ The addition of descriptive words to the depositor's name does not render the deposit special;⁸ but where a mortgage was left with a bank for collection and not to be credited, and the amount to be kept until the depositor could withdraw it after notification, the transaction was held to create a special deposit;⁹ but where such a secu-

posit is marked "special" in the pass-book, it may be shown to be general. *Carr v. State*, 104 Ala. 43. But whether this rule would apply between the bank and depositor is questionable.

¹ *In re Mutual Building Soc.*, 2 Hughes, 374. Receiver's moneys deposited in a bank are not special deposits. *South Development Co. v. Houston, etc. Ry. Co.*, 27 Fed. R. 344.

² *Drawn v. Pawtucket Bank*, 15 Pick. 88.

³ *Carr v. State*, 104 Ala. 43.

⁴ *People v. St. Nicholas Bank*, 28

N. Y. Supp. 407; *Mutual Ass'n v. Jacobs*, 141 Ill. 261.

⁵ *Ward v. Johnson*, 95 Ill. 215; *Matthews v. Creditors*, 10 La. Ann. 342.

⁶ *Mutual Ass'n v. Jacobs*, 43 Ill. App. 340.

⁷ *Anderson v. Pacific Bank*, 112 Cal. 598. See also *Dearborn v. Wash. Sav. Bank*, 13 Wash. 345.

⁸ *McLain v. Wallace*, 103 Ind. 562. Compare *Otis v. Gross*, 96 Ill. 612, which was a deposit of public funds.

⁹ *In re Johnson*, 108 Mich. 109; *State v. State Bank*, 42 Neb. 896.

rity was credited to the depositor as cash, the deposit was general;¹⁰ and the invariable rule is that whether securities are deposited for collection or for credit, as soon as they are collected and go into the general funds of the bank the deposit becomes a general one, creating the relation of debtor and creditor.¹¹ The proof to identify the special deposit is often necessarily circumstantial.¹²

§ 164. Liability of bank upon special deposit.—The relation of the bank to its special depositor is that of bailee.¹ Whether it is a gratuitous bailment or one for hire depends upon circumstances. Since, by the very definition of the word "special" deposit, the bank can obtain no advantage by using the deposit, if it is not paid for the work which it does, it is a gratuitous bailee, the consideration being simply the delivery of the thing.² If the bank has any claim upon the thing deposited, such as a claim upon it as collateral security, the bank is pledgee and not gratuitous bailee. The degree of care required from a gratuitous bailee has been variously defined by courts. It is a liability for gross negligence only,³ for ordinary care under the circumstances,⁴ or

¹⁰ *Bennett v. Knapp*, 9 N. Y. Supp. 766.

¹¹ See § 133, *ante*. And see also § 343, *post*. The same rule applies to savings deposits, where savings banks are debtors to their depositors. *Wetherell v. O'Brien*, 140 Ill. 146. This last case, however, gives the extreme rule against the priority of a special depositor. The decision is not sound upon that point, although in accordance with the rule in Illinois. The better rule is that stated in § 342, *post*, where the right of priority is considered.

¹² *Dougherty v. Vanderpool*, 35 Miss. 165.

¹ *McLain v. Wallace*, 103 Ind. 562; *Kinsela v. Cataract City Bank*, 18 N. J. Eq. 158. It is the bank which is the bailee, not the officers. *Foster v. Essex Bank*, 17 Mass. 479. This decision is in its result wholly and completely erroneous. The bank is also called agent. In *re Johnson*, 103 Mich. 109; *L'Herbette v. Pittsfield Nat. Bank*, 162 Mass. 137.

² *Robinson v. Threadgill*, 13 Ired. 39. A statute sometimes makes a gratuitous bailment one for hire. *Merchants' Nat. Bank v. Guilmar-tin*, 93 Ga. 503.

³ *Foster v. Essex Bank*, 17 Mass. 479; *White v. Commonwealth Nat.*

⁴ *Maury v. Cole*, 34 Md. 235; *First Nat. Bank v. Zent*, 39 Ohio St. 105;

Lancaster Co. Bank v. Smith, 62 Pa. 47.

for the care it bestows upon its own goods.⁵ The two first descriptions do not differ in any rational sense.⁶ The liability of the bank for its agents' and officers' acts has been defined to be absolute,⁷ or simply ordinary care in employing an apparently reliable agent, where the loss does not arise from a delivery to the wrong person or from an act of the agent in the due course of his employment.⁸ But where the bank was benefited by the agent's act, its liability remains, whatever the care shown in his employment.⁹ But whatever the rule as to liability may be, if the bank through any of its proper officers has notice of the particular officer's unreliability, where the loss is caused by such an officer, the bank will be liable for the special deposit.¹⁰ Certain facts are considered absolute evidence of gross negligence, such as to leave the special deposit in a place to which others than the agents of the bank have access.¹¹ But where the

Bank, Fed. Cas. No. 17,544; Hale v. Rawallie, 8 Kan. 136; Sturges v. Keith, 57 Ill. 451; Carlisle Bank v. Graham, 100 U. S. 699; First Nat. Bank v. Graham, 79 Pa. 106; Whitney v. Brattleboro Bank, 55 Vt. 154; First Nat. Bank v. Rex, 89 Pa. 308.

⁵ Scott v. National Bank, 72 Pa. 471. Pennsylvania is on all sides of the question. Levy v. Pike, 25 La. Ann. 630.

⁶ See § 79, note 20. Gross negligence is said to be equivalent to fraud. Foster v. Essex Bank, *supra*. But the point where ordinary negligence ends and gross negligence begins is too shadowy to furnish any reasonable guide.

⁷ United Soc. v. Underwood, 9 Bush, 609; First Nat. Bank v. Graham, 85 Pa. 91; El Paso Nat. Bank v. Fuchs, 34 S. W. R. 203; Carlisle Bank v. Graham, 100 U. S. 699. This is the correct rule. The opposing cases are founded upon an obsolete rule as to torts.

⁸ Scott v. National Bank, 72 Pa. 471; De Haven v. Kensington Nat. Bank, 81 Pa. 95; White v. Commonwealth Nat. Bank, Fed. Cas. No. 17,544; Smith v. First Nat. Bank, 99 Mass. 605; Sturges v. Keith, 57 Ill. 451; and see Preston v. Prather, 137 U. S. 604. If a court is unable to understand the fallacy involved in these holdings, no amount of argument upon the question will do any good. The employer is held liable because as bailee he owes a duty, which he does not perform by merely exercising due care in hiring his servants. See 1 Jaggard, Torts, 261 et seq.

⁹ Monmouth First Nat. Bank v. Dunbar, 118 Ill. 625.

¹⁰ Merchants' Nat. Bank v. Guilmartin, 93 Ga. 503; Preston v. Prather, 137 U. S. 604.

¹¹ Gray v. Merriam, 46 Ill. App. 337; Pattison v. Syracuse Nat. Bank, 80 N. Y. 82; but see Scott v. National Bank, 72 Pa. 471.

bank is a bailee for hire or is a mandatary, the bank will be held liable for ordinary care and diligence;¹² but the bailment cannot be assumed to be for hire.¹³ Since the bank is a bailee it is liable for no loss that occurred through a burglary¹⁴ or theft,¹⁵ unless its negligence contributed to the loss. A fraudulent release obtained by the bank will be no defense.¹⁶ The bank is at all events liable for a delivery to the wrong person;¹⁷ but a delivery to one authorized to receive the deposit will be good,¹⁸ even though the bank did not know of the authority at the time of the delivery.¹⁹ The bank, if the deposit is lost, has the burden of showing that the loss was not due to its fault,²⁰ although one case holds that the burden of proof is on the depositor to show gross negligence on the part of the bank.²¹ The depositor may sue both the bank and the officer whose negligence caused the loss.²² The statute of limitations begins to run from the date of the demand for the return of the deposit,²³ but it is also said that it begins to run from the date of the discovery of the fraud.²⁴ If a bank converts a special deposit

¹² *Prather v. Kean*, 29 Fed. R. 498; *U. S. 267*; *Fisk v. Germania Nat. Bank*, 40 La. Ann. 820.
¹³ *Hollister v. Central Nat. Bank*, 119 N. Y. 634; *Onderkirk v. Central Nat. Bank*, 119 N. Y. 263.

¹⁴ *Merchants' Nat. Bank v. Guilmarin*, 88 Ga. 797.

¹⁵ *Wylie v. Northampton Bank*, 119 U. S. 361.

¹⁶ *Dearbourn v. Union Nat. Bank*, 58 Me. 273.

¹⁷ *Gould v. Cayuga Co. Bank*, 86 N. Y. 75.

¹⁸ *White v. Commonwealth Nat. Bank*, Fed. Cas. No. 17,544; *Walker v. Manhattan Bank*, 130 U. S. 267; *Gaully v. Troy City Bank*, 98 N. Y. 487. Care used is immaterial. *Lancaster County Bank v. Smith*, 62 Pa. 47.

¹⁹ *Walker v. Manhattan Bank*, 130

¹⁹ *Chattahoochie Nat. Bank v. Schley*, 58 Ga. 369.

²⁰ *White v. Commonwealth Nat. Bank*, Fed. Cas. No. 17,544; *Merchants' Nat. Bank v. Carhart*, 95 Ga. 394; *First Nat. Bank v. Zent*, 39 Ohio St. 105. The Pennsylvania court, which appears to have an uncontrollable antipathy to special deposits, says the burden is on the plaintiff to show gross negligence. *First Nat. Bank v. Rex*, 89 Pa. 308.

²¹ See last note.

²² *Coffin v. Anderson*, 4 Blackf. 395. They are joint tort-feasors.

²³ *Gauley v. Troy City Bank*, 98 N. Y. 487.

²⁴ *Hughes v. First Nat. Bank*, 110 Pa. 428.

into money and mingles the funds, the depositor could ratify the act and hold the bank liable as debtor and not as bailee.²⁵

§ 165. Banks which may receive special deposits.— Whether a bank has power to receive special deposits or not, if it is accustomed to do so it will be liable for them;¹ yet if the directors of the bank did not know of the cashier's act in receiving the special deposit and were not guilty of negligence, where the bank has no such power the bank will not be liable.² But if the bank receives a benefit from the deposit, it will not be heard to object that it had not authority to receive it.³ National banks are by necessary implication, if not by express grant, given the power to receive special deposits;⁴ but such a power is not granted by an authority conferred to carry on the business of receiving money on deposit.⁵

§ 166. Actions upon deposits.— No right of action accrues upon a general deposit until a demand has been made,¹ unless on account of circumstances no demand is required.² Thus, if the contract was illegal whereby the deposit was received,³ or if the bank suspends payment,⁴ or notifies the

²⁵ If such were the case, due care would not exonerate the bank, if the special deposit should be lost.

¹ First Nat. Bank v. Zent, 39 Ohio St. 105; First Nat. Bank v. Graham, 79 Pa. 106; Pattison v. Syracuse Nat. Bank, 80 N. Y. 82; Chattahoochie Nat. Bank v. Schley, 58 Ga. 369.

² Lloyd v. West Branch Bank, 15 Pa. 172. On the construction of the word "deposits" this case is wrong.

³ Sykes v. First Nat. Bank, 2 S. Dak. 242.

⁴ Carlisle First Nat. Bank v. Graham, 100 U. S. 699; First Nat. Bank v. Strang, 138 Ill. 347. Yet even this obvious proposition has been denied. Whitney v. First Nat.

Bank, 50 Vt. 388; First Nat. Bank v. Accam Nat. Bank, 60 N. Y. 278.

⁵ First Nat. Bank v. Citizens' Bank, Fed. Cas. No. 4802. This decision is probably not sound even on this ground, nor is Lloyd v. West Branch Bank, 15 Pa. 172.

¹ Johnson v. Farmers' Bank, 1 Har. 117; Bank of British No. Am. v. Merchants' Nat. Bank, 91 N. Y. 106; Brahm v. Adkins, 77 Ill. 263; Sickles v. Herold, 149 N. Y. 332.

² See two last cases cited.

³ White v. Franklin Bank, 22 Pick. 181.

⁴ Planters' Bank v. Farmers' Bank, 8 Gill & J. 449; Watson v. Phoenix Bank, 8 Met. 217.

depositor that it will not pay the deposit,⁵ or claims the deposit as its own,⁶ or for a third person,⁷ or where the bank has stated an account,⁸ or where an overpayment was allowed to the bank by a mistake,⁹—in either case no demand is needed. On certificates of deposit the right of action does not accrue until a demand has been made,¹⁰ unless a demand is excused by circumstances. The right of action against the bank will not be taken away by the fact that the depositor has elected to sue one who fraudulently received the deposit,¹¹ nor by the fact that the depositor has proven his claim before the receiver, where no payment was made on the claim.¹² But if it appears that the deposit has been attached in favor of a third party, the bank is entitled to a stay until that matter is determined.¹³ The remedy on a general deposit is at law, as a general rule,¹⁴ and so it is upon a certificate of deposit, even though the person in whose name the certificate of deposit was issued refuses to indorse it.¹⁵

§ 167. Who may maintain action.—If the deposit is in the name of the real owner, he, of course, may sue or his assignee. If the depositor is dead, the personal representative should sue. It seems that the true owner of the deposit may sue the bank without joining the depositor.¹ If the deposit

⁵ *Farmers' Bank v. Planters' Bank*, 10 Gill & J. 422.

⁶ *Bank of Mo. v. Benoist*, 10 Mo. 519.

⁷ *Carroll v. Cone*, 40 Barb. 220.

⁸ *Bank of Mo. v. Benoist*, 10 Mo. 519. *Contra*, *Downes v. Bank of Charleston*, 6 Hill (S. C.), 297.

⁹ *Goodell v. Brandon Nat. Bank*, 63 Vt. 303.

¹⁰ *Brown v. McElroy*, 52 Ind. 404; *Howell v. Adams*, 68 N. Y. 314; *Munger v. Albany Nat. Bank*, 85 N. Y. 580; *Bellows Falls Bank v. Rutland Co. Bank*, 40 Vt. 377. The demand is good if on bank examiner in possession. *First Nat. Bank v. Strang*, 28 Ill. App. 325. The

same rule applies to special deposits, but none is needed if a conversion has taken place. *Monmouth Bank v. Dunbar*, 19 Bradw. 558.

¹¹ *August v. Fourth Nat. Bank*, 1 N. Y. Supp. 139.

¹² *Watson v. Phoenix Bank*, 8 Met. 217.

¹³ *Ferguson v. Bank*, 25 Kan. 333.

¹⁴ The action would be debt or *assumpsit*, unless, of course, it is necessary to enforce a trust or some other equitable right.

¹⁵ *Fultz v. Walters*, 2 Mont. 165. Compare *Chosen Freeholders v. Newark City Bank*, 48 N. J. Eq. 51.

¹ *Walsh v. National Broadway Bank*, 33 N. Y. Supp. 998.

was made by the husband in his wife's name, but not as a gift to her, and she be dead, the husband may sue without joining her representative.² Similarly a deposit made in escrow to be paid to a third party may be sued for by the depositor without joining the third party.³ A deposit by a man as agent may be sued for by him even where a suit is required to be brought by the real party in interest.⁴ A trustee may sue in his own name, either joining the beneficiary or not.⁵ Joint deposits to be drawn upon a joint check must be sued for by the partners jointly;⁶ but a joint deposit of collaterals upon a debt after the debt has been paid does not give a joint right of action for the collaterals; each one must sue for his own collaterals.⁷ Where the depositor has an action against the stockholders, the parties defendant must be determined according to the right given by the statute.⁸

§ 168. Bank's rights when sued.—Wherever conflicting claims are made upon the bank by different persons, the bank has the undoubted right to compel the parties to interplead and relieve it of the necessity of contending with either.¹ When an action is brought by a third party against the bank for the deposit, the bank performs its duty to the depositor by giving him full and timely notice and requiring him to defend the action.²

² *Davis v. Lebanon Co. Sav. Bank*, 53 Mich. 163.

³ *Ullrich v. National Bank (Cal.)*, 37 Pac. R. 500.

⁴ *McLaughlin v. First Nat. Bank*, 6 Dak. 406.

⁵ *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 333.

⁶ *Rand v. State Bank*, 77 N. C. 152.

⁷ *Henelly v. Rittenhouse*, 7 D. C. 76.

⁸ *Wadsworth v. Hocking*, 61 Ill. App. 156. Here the party suing was not required to join those who had transferred their stock, though

not in a manner required by the articles of incorporation. In former sections the persons to be sued as stockholders upon the liability to creditors has been considered. See § 58, *ante*, et seq., for the liability upon the stock subscription and the liability for debts. Deposits are, of course, debts of the corporation.

¹ *Foss v. First Nat. Bank*, 3 Fed. R. 185; *Dreschied v. Exchange Bank*, 28 W. Va. 340; *Ullrich v. National Bank*, 37 Pac. R. 500.

² *Detroit Sav. Bank v. Burrows*, 34 Mich. 153.

§ 169. **Limitations upon actions for deposits.**— Various rules have been laid down as to when the statute of limitations will begin to run upon a deposit. Under some statutes there is no limitation.¹ In another state the pass-book is held to be an evidence of indebtedness in writing and the action is governed by the provision applicable thereto.² But in another state a receipt for a deposit was held to be not a written contract.³ Other states hold that the statute begins to run from the statement of the account,⁴ which would be the monthly balance struck.⁵ The rule is held in another jurisdiction that the statute begins to run from the date of the deposit.⁶ This rule is held in other states as to certificates of deposit payable upon demand.⁷ But the rule ought to be in reason and common sense that the statute begins to run both upon deposits⁸ and upon certificates of deposit, whether payable on demand or not, from the demand,⁹ or from a refusal to pay the deposit,¹⁰ or something equivalent thereto, such as a notification that the bank will not pay¹¹ or its suspension.¹² The publication of an unclaimed deposit

¹ *Green v. Odd Fellows Bank*, 65 Cal. 71.

² *Schalucky v. Field*, 124 Ill. 617.

³ *Talcott v. First Nat. Bank*, 53 Kan. 480.

⁴ *In re Penn Bank*, 152 Pa. 65.

⁵ *Union Bank v. Knapp*, 3 Pick. 96. See *Dickinson v. Leominster Bank*, 152 Mass. 49.

⁶ *Locke v. First Nat. Bank*, 65 N. H. 670. This is the rule as to certificates of deposit payable on demand in some jurisdictions. *Brummagim v. Tallent*, 29 Cal. 503; *Mitchell v. Easton*, 37 Minn. 335.

⁷ See the last note.

⁸ *Viets v. Union Nat. Bank*, 101 N. Y. 563; *Starr v. Stiles*, 19 Pac. R. 225; *Branch v. Dawson*, 33 Minn. 399; *Girard Bank v. Bank*, 39 Pa. 92; *Brown v. Pike*, 34 La. Ann. 576; *Union Bank v. Planters' Bank*, 9

Gill & J. 439; *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 333. The last case contains a foolish suggestion as to laches.

⁹ *Howell v. Adams*, 68 N. Y. 314; *McGough v. Jamison*, 107 Pa. 336; *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320. If it be a time certificate the same rule ought to apply, because no suit lies until a demand is made.

¹⁰ This is equivalent to a demand. *Farmers' Bank v. Planters' Bank*, 10 *Gill & J.* 422; *Viets v. Union Nat. Bank*, 101 N. Y. 563, a refusal to pay a check.

¹¹ See last note.

¹² *Union Bank v. Planters' Bank*, 9 *Gill & J.* 439; but *Riddle v. First Nat. Bank*, 27 Fed. R. 503, is *contra* as to certificates of deposit, where a receiver was appointed.

has been held to be a new promise to take the case out of the statute.¹³ But the payment of interest after the withdrawal of a partner will not continue the cause of action against the withdrawing partner.¹⁴ And a bank may pay an undisputed check without suspending the statute as to a disputed part of the deposit.¹⁵

§ 170. Presumptions and burden of proof.—Wherever the fact of a deposit appears, the burden is on the bank to prove payment;¹ although, if the depositor retains his pass-book for a time without objection, the burden is upon him to show a mistake.² So likewise, although the burden is upon the bank to show that the payee's indorsement upon a check is genuine,³ yet the retention of the check by the depositor for a long time without objection throws the burden of proof upon him.⁴ Where it is shown that notice was given to the bank by the depositor not to pay a check, the burden is upon the bank to show that the check was paid before the notice was received;⁵ and after notice given by the person claiming to be the true owner, where the deposit indicates the ownership, has been shown to the bank, the burden is upon the bank to show payment to the true owner.⁶ Where funds are mingled in one deposit, the presumption is that the depositor's checks were drawn against and paid from the funds belonging to the person drawing the check.⁷ Where the administrator of a decedent makes claim to a deposit upon the fact of a pass-book being found among the decedent's effects, if the name upon the pass-book and the description of the depositor do not correspond to that of the deceased, the burden is upon the administrator to show

¹³ *Adams v. Orange Co. Bank*, 17 Wend. 514.

¹⁴ *Robinson v. Floyd*, 159 Pa. 165.

¹⁵ *Viets v. Union Nat. Bank*, 101 N. Y. 563.

¹ *De Land v. Dixon Nat. Bank*, 111 Ill. 323.

² *Anderson v. Leverich*, 70 Iowa, 741.

³ *Morgan v. State Bank*, 1 Duer, 434; *August v. Fourth Nat. Bank*, 1 N. Y. Supp. 139.

⁴ See last case.

⁵ *Albers v. Commercial Bank*, 85 Mo. 173.

⁶ *Arnold v. Macungie Sav. Bank*, 71 Pa. 287.

⁷ *Hall v. Otis*, 77 Me. 122.

the decedent's ownership.⁸ The receipt of the cashier is presumptive proof of a deposit,⁹ and where the amount in the body of the certificate differs from the amount stated in the margin, the presumption is that the body of the certificate is correct.¹⁰ But a certificate of deposit is said to be a receipt and explainable by parol evidence,¹¹ but the certificate can be overcome only by clear and satisfactory proof.¹² It is presumptively correct,¹³ as are the books of the bank even as against the stockholders in favor of the depositor.¹⁴

⁸ *People v. Third Ave. Sav. Bank*, 98 N. Y. 661.

⁹ *State Bank v. Kain*, 1 Ill. 45.

¹⁰ *Payne v. Clark*, 19 Mo. 152.

¹¹ *Hotchkiss v. Mosher*, 48 N. Y. 478. This case is not correct on this point. All the authority is that a certificate of deposit is the bank's promissory note.

¹² *First Nat. Bank v. Myers*, 83 Ill. 507.

¹³ *Cushman v. Illinois Starch Co.*, 79 Ill. 281.

¹⁴ *Davis v. Naper*, 91 Ill. 44. They are admissions, and hence need not be the books of original entry. The books of a savings bank are admissible to show the fact of deposit and ownership. *McKavlin v. Bresslin*, 8 Gray, 177. See also § 132, *ante*.

CHAPTER VIII.

COLLECTIONS.

§ 171. **The nature of the relation.**—The deposit of paper with a banker for collection creates a relation which has generally been defined as that of principal and agent. But an accurate use of language requires something other than such a description. The banker is certainly an agent in so far as he is authorized to receive payment. But he is certainly not an agent to collect the paper, because there are numerous steps which the principal might take in collecting which the bank cannot take. All paper deposited for collection necessarily requires an indorsement either general or for collection. In either case the legal right to the possession of the paper passes to the bank.¹ The relation is properly called a bailment, because while it does not contemplate the receiving back of the particular thing, yet, as in cases of pledges of negotiable paper, it may be collected and yet remain a bailment as to the proceeds.² The relation is not that of trustee and *cestui que trust*, because the remedy is at law, not solely in equity, where a breach of trust must be redressed. It is a trifle singular that in our day the old confusion which existed between agency, trust and bailment should reappear. We are told in that work which represents such a marvelous amount of industry and acumen, Pollock and Maitland's History of English Law, that originally there was no distinction made between agency, trust and bailment. See pages 226, 227, 231, of volume 2. The relation being that of bailment, it has an important bearing upon the question of the collecting bank's liability for the acts of its

¹ *Evansville Bank v. German Am. Nat. Bank*, 155 U. S. 556. It is conceived that this statement means title against every one except the bailor.

² *Beal v. Somerville*, 50 Fed. R. 649, 5 U. S. App. 14. no more than that the bailee has

agents. This contract of bailment has annexed to it certain duties created by the usages of commerce which have become recognized as rules of law. The law defines the duties of the collecting bank, and it need not be proven what the contract was, even where it is alleged.³ Yet if any specific agreement was made by or direction given to the bank, it must be observed,⁴ if the bank accepts the collection. The analogy of this bailment and that of the common carrier is complete. The *quasi*-contract created by custom may be modified by express agreement. And it is believed that a bank could no more contract against its own negligence than a common carrier could. But it has been said, where a note is left with a bank without any direction whatever, the bank may either discount the note or hold it until maturity and collect it.⁵ Where the collection is on the particular bank wherein it is placed for collection, and the request is to remit by mail, the relation created is that of depositor and banker.⁶ The consideration for the acceptance of the duty is the advantage which the bank receives from the rate of exchange,⁷ or, where there is no charge, the use of the money;⁸ but in truth no consideration is needed beyond the acceptance, as every court and lawyer ought to have known.

§ 172. What law governs.—Where the duty of collection is to be wholly performed in one state where both the

³ *Jagger v. German Am. Bank*, 53 Minn. 386. See the form of pleading at common law on the bailment, note 7 to § 184, *post*, and note 2 to § 186, *post*.

⁴ *Power v. First Nat. Bank*, 6 Mont. 251; *Central Georgia Bank v. Cleveland Nat. Bank*, 59 Ga. 667.

⁵ *Drown v. Pawtucket Bank*, 15 Pick. 88.

⁶ *People v. Merchants' Bank*, 78 N. Y. 269. This is on the supposition that the collection is honored and paid. But a special contract

would make the proceeds a special deposit.

⁷ *Titus v. Mechanics' Nat. Bank*, 35 N. J. Law, 588.

⁸ *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 288; *Mechanics' Bank v. Merchants' Bank*, 6 Met. 13; *Merchants' Nat. Bank v. Goodman*, 109 Pa. 426. But if the deposit is a bailment no consideration is needed beyond the delivery, except to make the bank liable for ordinary diligence.

owner of the collection and the bank reside, the relation is to be governed by the law of that state; but where a bank in one state sends a draft into another state to a bank for collection, the relation is governed by the law of the latter state, if the collection is to be made therein;¹ otherwise it is to be governed by the law of the state where the contract is to be performed.²

§ 173. Collection to be made at bank.—Where a note or other security is made payable at a bank, the bank is not thereby made the agent of the payee or holder to receive payment,¹ and any payment which it receives from the maker on such a security it receives as the maker's agent and not the payee's.² One case has gone so far as to hold that the presentation of the note and the having it marked good by the teller of the bank does not constitute payment to the payee.³ But the payee of the note may make the bank his agent to receive payment on the note.⁴ If he does so, the bank is bound to the same duties that any other bank owes to one depositing paper for collection.⁵ If it has funds of the maker and fails to credit them on a check, it

¹ *Kent v. Dawson Bank*, 13 Blatchf. 237.

² *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26. It is amusing to note that the court does not consider the decisions of the Supreme Court of Tennessee any proof of what the common law is.

³ *Ward v. Smith*, 7 Wall. 447; *Wood v. Merchants' Sav. Co.*, 41 Ill. 267; *Caldwell v. Evans*, 5 Bush, 380; *Pease v. Warren*, 29 Mich. 9; *Williamsport Gas Co. v. Pinkerton*, 95 Pa. 62; *Grissom v. Commercial Nat. Bank*, 87 Tenn. 350.

⁴ *Ward v. Smith*, 7 Wall. 447.

⁵ *Wood v. Merchants' Sav. Co.*, 41 Ill. 267. But there is a grave question whether this decision is

correct. If the note were a check and presented and certified to the payee, there would be a novation and the drawer would be released. The same rule applies to the certification of a note. *Riverside Bank v. First Nat. Bank*, 74 Fed. R. 276. The bank becomes liable and the drawer is released. The court in this case did not seem to understand that a certification takes so much of the drawer's money and gives it to the bank. The payee by obtaining the certification asks for it. The case is wrong.

⁴ *Ward v. Smith*, 7 Wall. 447.

⁵ *Blakeslee v. Hewitt*, 76 Wis. 341; *Wood River Bank v. First Nat. Bank*, 36 Neb. 744.

will make itself liable for the check,⁶ but not if it credits the check and, finding the depositor insolvent, before it communicates the credit to the payee, revokes it.⁷ Where a note is made payable at a bank, as we have seen, the great weight of authority is that the bank has the right to apply upon it a deposit to the credit of the person liable to pay the note;⁸ but this rule would properly apply only to the actual presence of funds, although if it did pay the note it would thereby become the owner and could enforce it against the maker.⁹ Hence if there is a credit to the maker in the bank which is made the payee's agent, in those jurisdictions which admit the bank's right to make the application, the bank would be liable for failing to make the application of the deposit.¹⁰ But in those jurisdictions which do not admit this right in the bank, there would probably be no such duty;¹¹ certainly not unless the payee agreed to it,¹² and certainly not as to deposits afterwards received.¹³

§ 174. Revocation of the power to collect.—The collecting bank receives a certain power over the collection when it receives it. On the analogy of an agency, the holder may revoke the power, if the bank has not acquired a lien upon the proceeds, at any time before the collection has been made.¹ An injunctive order forbidding the collection revokes the power and is binding upon all those who have

⁶ *Minier v. Second Nat. Bank*, 13 N. Y. St. R. 222. But not if the person depositing the check deceives the bank. *Middlesex Co. v. State Bank*, 32 N. J. Eq. 467.

⁷ *Steinhart v. National Bank*, 94 Cal. 362. This case can hardly be reconciled with cases of higher authority on the effect of payment. See § 158, *ante*.

⁸ See § 142, *ante*. This is the rule in England. *Roberts v. Tucker*, 16 Q. B. 560.

⁹ *Watervliet Bank v. White*, 1 Denio, 608.

¹⁰ This follows from the fact that the bank must take all steps proper to collect. See *Indig v. Nat. City Bank*, 80 N. Y. 100.

¹¹ The bank would not transfer anything by applying on the note.

¹² *Bellows v. Norton*, 12 Heisk. 319.

¹³ *Merchants' Bank v. Meyer*, 56 Ark. 499, and cases cited therein.

¹ *Semble*, *Ward v. Smith*, 7 Wall. 447. But revocation could not cut off the bank's lien.

notice or knowledge of the order.² The power is revoked, also, by the insolvency of the collecting bank;³ and since the reception of a collection by a bank which is known to its officers to be insolvent is a fraud, the power to collect in such a case ought to be considered as never having been given to the bank.⁴ The bank itself cannot revoke the so-called agency merely by making an erasure upon its books.⁵

§ 175. Bank-lien upon collections.—The bank has its customary lien upon a collection left with it or the proceeds for any debt that is matured owing by the owner of the paper to the bank unless there be a special agreement not consistent therewith.¹ If the paper comes to a correspondent bank which has notice of the fact that it is a collection for the owner, not the bank, it has no lien upon the paper for a claim which it has against its correspondent bank.² The form of the indorsement may be notice to it. Thus, an indorsement for collection is full notice of the owner's rights;³ so is an indorsement for the account of the depositor;⁴ and it has been held that an indorsement for collection and credit is also notice.⁵ A mere indorsement for credit ought to be just as much notice as an indorsement

² Louisiana Ice Co. v. State Nat. Bank, 1 McGloin, 181.

³ First Nat. Bank v. First Nat. Bank, 76 Ind. 561; Bank of Clarke Co. v. Gilman, 81 Hun, 486, 152 N. Y. 634. But of course the correspondent bank's right to collect remains as to paper in its hands. But it cannot pay over to the insolvent bank. Evansville Bank v. Bank, 155 U. S. 556.

⁴ This would not affect correspondent banks without notice, except that they would have no right after notice to pay to the insolvent bank. Armstrong v. National Bank, 90 Ky. 431.

⁵ Bank of Mobile v. Huggins, 3 Ala. 206.

¹ Cockrill v. Joyce, 62 Ark. 216; Gibbons v. Hecox, 105 Mich. 509. In cases of insolvency it would have lien for an unmatured debt, except in a few states.

² Lawrence v. Stonington Bank, 6 Conn. 521; Bank of Metropolis v. New England Bank, 1 How. 234, 6 How. 212; Sweeney v. Easter, 1 Wall. 166.

³ Sweeney v. Easter, 1 Wall. 166; Evansville Bank v. German Am. Bank, 155 U. S. 556.

⁴ White v. National Bank, 102 U. S. 658.

⁵ Armstrong v. National Bank, 90 Ky. 431.

for collection and credit, since both indorsements mean exactly the same thing, and the fact shows from the deposit in a bank. A general indorsement, however, shows nothing, and hence would not be notice. The correspondent bank, if it has no notice of any ownership other than that of the remitting bank, may claim a lien upon the paper or its proceeds to the extent of any credit given to the correspondent bank upon its presumed ownership of the paper,⁶ or it may claim a lien created by agreement or by a course of dealing.⁷ If, however, the paper transmitted by another bank be generally indorsed and for account, yet, if it be accompanied by an explanatory letter, the receiving bank will have notice of whatever is communicated to it by the letter.⁸

§ 176. Authority of the collecting bank.—As a general rule the collecting bank cannot take anything else than money in payment of a collection except by agreement with the apparent owner.¹ If it take anything else than money, such as a certificate of deposit upon the bank where the paper is payable, it takes the risk of the payment of it;² but, it seems, if there is such a custom, it may take its own certificate of deposit, and if it does the collection is paid;³ and another case holds that the collecting bank may take a certified check, and that such a check is payment of the col-

⁶ *Bank of Metropolis v. New England Bank*, 1 How. 234. The lower court was unable to understand the opinion (*New England Bank v. Bank of Metropolis*, Fed. Cas. No. 10,152), and on a second appeal the Supreme Court furnished it with a set of instructions. *Bank of Metropolis v. New England Bank*, 6 How. 212. For other authorities, see § 193, *post*, note 1.

⁷ See *Studebaker Mfg. Co. v. First Nat. Bank*, 42 S. W. R. 573; *Commercial Bank v. Armstrong*, 148 U. S. 50.

⁸ *Williams v. Jones*, 77 Ala. 294.

¹ *Whipple v. Walker*, 2 Thomp. & C. 456; *German Am. Bank v. Third Nat. Bank*, 5 Dill. 104; *Scott v. Gilkey*, 153 Ill. 168; *Graydon v. Patterson*, 13 Iowa, 256.

² *Essex Co. Nat. Bank v. Montreal Bank*, 7 Biss. 193; *Commercial Bank v. Union Bank*, 11 N. Y. 203; *Hazlett v. Comm. Nat. Bank*, 132 Pa. 118.

³ *British Mort. Co. v. Tibballs*, 63 Iowa, 468.

lection.⁴ There is recognized, too, in some jurisdictions the right of the collecting bank to take from the person upon whom the collection is, his check, and if the check is collected with due diligence the collecting bank incurs no responsibility, provided it does not surrender the paper,⁵ and one case has so held even where the paper is surrendered.⁶ Presentment through the clearing-house has been held to be not negligence where the check or paper went to the bank on which it was drawn.⁷ But the owner may waive the default of the bank in collecting something other than money, and claim as owner whatever the bank has obtained for the collection.⁸ The collecting bank has no right to accept a partial payment.⁹ If the collection is a draft, accompanied by a bill of lading, the bank may surrender the bill of lading upon acceptance of the draft,¹⁰ unless it has agreed otherwise,¹¹ and the burden is upon the drawer to show his instruction.¹² But the fact that the bill of lading is drawn to the drawer and not to the drawee is persuasive evidence of such an instruction from the bill of lading itself.¹³ The bank has the right, according to an incorrect doctrine, to employ agents for the owner in making the collection,¹⁴ but it has no right to employ an attorney¹⁵ or to bring suit with-

⁴ Jefferson Co. Bank v. Comm. Nat. Bank, 39 S. W. R. 338.

⁵ St. Nicholas Bank v. State Nat. Bank, 128 N. Y. 26; Second Nat. Bank v. Cummings, 89 Tenn. 609; Citizens' Bank v. Houston, 98 Ky. 139. See note 7 to § 180, *post*.

⁶ Indig v. Nat. City Bank, 80 N. Y. 100.

⁷ Turner v. Bank of Fox Lake, 3 Keyes, 425.

⁸ German Am. Bank v. Third Nat. Bank, 5 Dill. 104, Fed. Cas. No. 5359.

⁹ Lowenstein v. Bressler, 109 Ala. 326.

¹⁰ National Bank of Commerce v. Merchants' Nat. Bank, 91 U. S. 92; Woolen v. New York Bank, 12

Blatchf. 359; Moore v. Louisiana Nat. Bank, 44 La. Ann. 99. See Commercial Bank v. Railway Co., 160 Ill. 401.

¹¹ See cases last cited.

¹² Second Nat. Bank v. Cummings, 89 Tenn. 609. See Addendum.

¹³ Case last cited; and see Security Bank v. Suttgen, 29 Minn. 363.

¹⁴ Planters' Bank v. First Nat. Bank, 75 N. C. 534; Dorchester Bank v. New England Bank, 1 Cush. 177. And see § 181, *post*.

¹⁵ Ryan v. Manufacturers' Nat. Bank, 9 Daly, 308; Crow v. Mechanics' Bank, 12 La. Ann. 692; Freeman v. Citizens' Nat. Bank, 78 Iowa, 150.

out previous instruction.¹⁶ The bank may also receive payment before maturity of the debt to be collected.¹⁷

§ 177. Liability of the bank in making collection.—The bank may incur a liability to the person from whom it collects. For example, a bank collected the amount of a note from the maker and delivered to him the wrong note, returning the right note to the holder, who collected it again from the maker. The maker at once returned the wrong note which had been given to him by the bank, and demanded the amount paid. The bank was compelled to pay, although during the interval the indorsers upon the latter note had become discharged and the maker was insolvent.¹ But the collecting bank is not the agent of the person from whom it collects, except when the paper is payable at that bank; and hence he cannot sue the bank for misappropriating the proceeds of the collection.²

§ 178. When collection complete.—As we have heretofore seen,¹ the collection does not become complete until the collection is made by the bank crediting to the owner the money realized as so much cash.² This result may be arrived at either by the collecting bank receiving the money or re-

¹⁶ If so instructed it must do so. *Finch v. Karste*, 97 Mich. 20.

¹⁷ *Bliss v. Cutler*, 19 Barb. 9.

¹ *Andrews v. Suffolk Bank*, 13 Gray, 461. So as to raised paper. *National Bank of Commerce v. Manufacturers' Bank*, 122 N. Y. 367. But not liable where it acted as agent and has paid over proceeds by crediting. *National Park Bank v. Seaboard Bank*, 114 N. Y. 28; *United States v. American Ex. Nat. Bank*, 70 Fed. R. 232. If the bank has not paid the proceeds it may correct the mistake. *Birmingham Nat. Bank v. Bradley*, 103 Ala. 109.

² *Smith v. Essex Co. Bank*, 22

Barb. 627. But one case holds that the drawee who gives a check to a collecting bank may sue it for failure to make timely presentment where he pays the collection again. *Morris v. Eufala Nat. Bank*, 106 Ala. 383.

¹ See § 133, *ante*.

² See § 133, *ante*, and *Moore v. Meyer*, 57 Ala. 20. This is as between the owner and the primary bank. But as between the payer and the owner the collection is complete when he makes payment to the collecting bank, whether it is the primary bank or not.

ceiving credit from another bank.³ If the collecting bank received something else than cash and credits the amount received as so much cash, the transaction is complete as to the owner of the collection. The collecting bank becomes liable to him as for so much money deposited.⁴ But the owner may claim the check or draft taken by the collecting bank as his own,⁵ a fact which has already appeared. If, however, the holder has instructed the collecting bank not to credit him upon collection, but to hold the amount and notify him so that he might withdraw it, some courts recognize that the holder becomes a special depositor, not a general creditor;⁶ and in reason this is the proper rule.⁷ But where no specific instruction has been given⁸ or special agreement made,⁹ and where no special course of dealing has been had authorizing a different conclusion,¹⁰ the proceeds, as soon as collected and deposited to the credit of the owner of the paper, become a general deposit in the bank,¹¹ but not until then.¹² Being then a general deposit, it is subject to all rights which the bank has upon deposits by way of lien, although the bank had a lien upon the paper before.¹³

³ *Corn Ex. Bank v. Farmers' Nat. Bank*, 118 N. Y. 443; *Howard v. Walker*, 92 Tenn. 452; *Briggs v. Central Bank*, 89 N. Y. 182.

⁴ *National Comm. Bank v. Miller*, 77 Ala. 168. And see § 176, *ante*.

⁵ See § 176, *ante*, note 5.

⁶ *In re Johnson*, 103 Mich. 109; *State v. State Bank*, 42 Neb. 896.

⁷ See § 133, *ante*. This results from the fact that the question of special deposit or general deposit is either one of mere presumption or of actual agreement. If there is an actual understanding resulting from an instruction given, that controls any presumption that would otherwise arise. If, however, the instruction is to collect and hold until called for, a general deposit results, as it would if the instruc-

tion was to collect and remit. *People v. Merchants' Bank*, 78 N. Y. 269. The bank becomes merely a substituted debtor.

⁸ Such instructions govern. See notes 6 and 7 to this section.

⁹ See last note.

¹⁰ See § 133, *ante*.

¹¹ *Anheuser-Busch Ass'n v. Clayton*, 56 Fed. R. 759, 13 U. S. App. 295; *In re Bank of Madison*, 5 Biss. 515. See § 133, *ante*.

¹² *Evansville Bank v. Germ. Am. Bank*, 155 U. S. 556; *Levi v. National Bank*, 5 Dill. 104; *First Nat. Bank v. Bank of Monroe*, 33 Fed. R. 408; *First Nat. Bank v. Armstrong*, 36 Fed. R. 59. In this latter case the court's holding as to mingling is pure *dictum*.

¹³ See § 175, *ante*. There are nu-

§ 179. Liability of the bank for failure.—The collecting bank may be the bank upon which the paper is drawn or another bank. The duties of the banks in such cases are not wholly similar. The collecting bank may itself collect the paper or may send the paper to another bank for collection. It may be guilty, if itself doing the act of collecting, of negligence in presenting the paper or in what it takes for payment, or in taking proper steps to hold the parties liable upon the paper. If the bank, in collecting, finds it necessary to employ a notary, the notary may be guilty of negligence. The bank to which it sends the paper may be guilty of negligence in collecting, or after collecting may hold the proceeds as against the first bank, or may become insolvent. In all such cases the rules applicable will be examined, and then the forms of action upon such negligence and the measure of recovery will be set forth so far as the decisions upon banking cases are applicable.

§ 180. Liability for its own negligence.—The general law applicable to presentment for acceptance and payment, demand, notice of non-payment and protest will be assumed for the present. The matter will be found fully considered under the head of "Exchanges," at section 205, *post*, et seq. The primary duty imposed upon a bank by taking paper for collection is to present it at the proper time, if presentment is necessary, and to demand payment at the proper time.¹ But banking law permits some modification in some jurisdictions to the effect that banking customs may vary the rules otherwise applicable. Thus, the owner of paper has

merous other cases which can be cited in support of the text, and it is believed that no court would now hold otherwise. The principle applies between banks as if the transmitting bank were holder and the corresponding bank the primary collecting agent.

¹Bank of Washington v. Triplett, 1 Pet. 25; McKinster v. Bank of

Utica, 9 Wend. 46; Capitol State Bank v. Lane, 52 Miss. 677; American Exp. Co. v. Pinckney, 29 Ill. 392; Fabens v. Mercantile Bank, 23 Pick. 330. It must follow instructions if any are given (Cent. Ga. Bank v. Cleveland Nat. Bank, 59 Ga. 667), and otherwise it may follow the course of business: Ide v. Bremer Co. Bank, 73 Iowa, 58.

been held bound by a banking custom to hold the paper for a few days after promise of payment.² If no demand for payment be made, the bank makes the paper its own and becomes liable therefor.³ It will be assumed, in the absence of proof, if the paper is not protested for non-payment, that the drawers are solvent.⁴ Ordinarily it will be held for the amount of the paper if it takes something else than money;⁵ yet its own certificate of deposit may be taken for money if such was the custom.⁶ Some courts permit the taking of a check as provisional payment, and exonerate the bank if it uses due diligence in collecting the check.⁷ The bank's ignorance of the law is no defense.⁸ In addition to making presentation of the paper, the bank must use all the ordinary legal means to secure payment.⁹ If it has secured the acceptance of a draft, and fails to present it for payment as required by law, it will be none the less liable.¹⁰ It must take proper steps to ascertain the place of residence of the party liable on the paper whom it is seeking to charge.¹¹ It has no authority to engage an attorney to bring suit,¹² yet if so instructed it must do so.¹³ Being a fiduciary it cannot

² *Sahlien v. Bank*, 90 Tenn. 221. A full collection of cases upon this subject may be found in 21 L. R. A. 441. They are generally upheld as against those who know of them and those who ought to be held to have known.

³ See cases cited in note 1 to this section.

⁴ *Capitol State Bank v. Lane*, 52 Miss. 677.

⁵ See § 176, *ante*.

⁶ *British Mort. Co. v. Tibbals*, 63 Iowa, 468. And some courts apply this rule to a check taken. *Citizens' Bank v. Houston*, 98 Ky. 139. See *Second Nat. Bank v. Cummings*, 89 Tenn. 609.

⁷ See § 176, *ante*. *Contra* are *Essex Bank v. Bank of Montreal*, 7 Biss. 193; *Bank of Antigo v. Union Trust*

Co., 149 Ill. 343. One case, by a divided court, applied this rule to a draft. *Indig v. City Nat. Bank*, 80 N. Y. 100. But the usual mode of payment is to credit the remitting bank. In the particular case it is difficult to see what difference there would have been between crediting the amount and sending the draft.

⁸ *Ivory v. State Bank*, 36 Mo. 475.

⁹ *Huff v. Hatch*, 2 Disn. 63.

¹⁰ *Mound City Co. v. Comm. Nat. Bank*, 4 Utah, 353.

¹¹ *Louisiana Ins. Co. v. Louisiana State Bank*, 3 Mart. (N. S.) 610. But if otherwise uninformed may follow the address on note. *Chapman v. Union Bank*, 32 How. Pr. 95.

¹² See § 176, *ante*, notes 12 and 13.

¹³ *Finch v. Karste*, 97 Mich. 20. It

defer the holder's claim while it secures its own claim;¹⁴ but if it give the owner of the paper timely notice it may secure a priority for itself.¹⁵ If payment or acceptance be refused, the bank must immediately give notice of non-payment or non-acceptance as required by law,¹⁶ and must take all the steps necessary to charge any indorser upon the paper. Any failure to do so is a breach of duty and is negligence.¹⁷ If the draft shows the bank where the acceptor is supposed to have funds, it should present to that bank,¹⁸ for it is the duty of the collecting bank to make demand at that place or presentment for payment.¹⁹ If the paper is indorsed generally to the collecting bank, it is not negligence in it to indorse it generally.²⁰ The liability of a correspondent bank

may have the implied authority to buy in the property sold. *Marks v. Bodie Bank*, 8 Pac. R. 807.

¹⁴ *Finch v. Karste*, 97 Mich. 20. See *U. S. Nat. Bank v. Westervelt*, 75 N. W. R. 857 (wrong).

¹⁵ *Freeman v. Citizens' Nat. Bank*, 78 Iowa, 150.

¹⁶ *Bank of Mobile v. Huggins*, 3 Ala. 206; *Nat. Pahquioque Bank v. First Nat. Bank*, 36 Conn. 225; *Bank of Hanover v. Kenan*, 76 N. C. 340; *Wingate v. Mechanics' Bank*, 10 Pa. 104; *Woolen v. New York Bank*, 12 Blatchf. 359; *Bank of Lindsborg v. Ober*, 31 Kan. 599; *Exchange Bank v. Sutton Bank*, 78 Md. 577. A fire does not excuse it. *Merchants' State Bank v. State Bank*, 69 N. W. R. 170. If accepted in the wrong name it is liable. *Walker v. State Bank*, 9 N. Y. 582. But it may act in accordance with established usage. *Patriotic Bank v. Farmers' Bank*, 2 Cranch C. C. 560; *Warren Bank v. Suffolk Bank*, 10 Cush. 582; *Haddock v. Citizens' Nat. Bank*, 53 Iowa, 542.

¹⁷ The bank must notify all the

indorsers. *Steele v. Russell*, 5 Neb. 211; *Smedes v. Utica Bank*, 20 Johns. 372; *Fabens v. Mercantile Bank*, 23 Pick. 330; *Thompson v. State Bank*, 3 Hill (S. C.), 77; *Bird v. La. St. Bank*, 93 U. S. 96, *semble*; *Woolen v. New York Bank*, 12 Blatchf. 359; *Chapman v. McCrea*, 63 Ind. 360; *West v. St. Paul Nat. Bank*, 54 Minn. 466. *Contra*, *Bank of Mobile v. Huggins*, 3 Ala. 206; *United States Bank v. Goddard*, Fed. Cas. No. 2937; *State Bank v. Bank of Capitol*, 41 Barb. 343; *Phipps v. Milbury Bank*, 8 Met. 79.

¹⁸ This is, of course, the general rule.

¹⁹ Illinois seems to hold the astonishing doctrine that since the bank where payable has no right to pay the draft for the depositor's credit, there is no necessity of making demand at that place (*Haines v. McFerron*, 19 Bradw. 172), unless the depositor has directed the payment.

²⁰ *Dorchester Bank v. New England Bank*, 1 Cush. 177.

is governed by the same rules, whether it is held liable to the holder or its immediate employer.²¹

§ 181. Liability for correspondent bank.—It is a practice so universal that any one must be held to know it, that a bank will employ another bank to make collections at a distance. But the legal relations that result are matters upon which courts are not agreed. But most courts agree that if the collecting bank employs as its agent the bank upon which the paper is drawn, or where it is payable, it is guilty of negligence,¹ and where that negligence can be considered the cause of an injury to the holder the first bank is liable.² But if such a proceeding is customary, one court affirms that customary negligence is not negligence.³ All courts agree that if the bank of primary collection does not use ordinary and reasonable care and diligence in selecting its correspondent bank, it is liable for the negligent acts and the defaults of that bank.⁴ If there is an express contract governing the liability of the initial bank, that contract will govern.⁵ But there being no express contract, the liability of the initial bank has been the subject of hot debate be-

²¹ To determine to whom liable consult the next section.

¹ First Nat. Bank v. Fourth Nat. Bank, 56 Fed. R. 967, 16 U. S. App. 1; Germ. Nat. Bank v. Burns, 12 Colo. 539; Western Scraper Co. v. Sadilek, 69 N. W. R. 765; Drovers' Nat. Bank v. Anglo-Am. Co., 117 Ill. 100; Merchants' Nat. Bank v. Goodman, 109 Pa. 422. *Contra*, Indig v. Nat. City Bank, 80 N. Y. 100; Briggs v. Cent. Nat. Bank, 89 N. Y. 182. But the New York court say the collecting bank does not make the second bank its agent. St. Nicholas Bank v. State Nat. Bank, 128 N. Y. 26. And the English court so held. Heywood v. Pickering, 43 L. J. Q. B. 145.

² This is simply the rule of proximate cause. First Nat. Bank v. City Nat. Bank, 84 S. W. R. 458.

³ Indig v. Nat. City Bank, 80 N. Y. 100. See note 1, *ante*.

⁴ Ætna Ins. Co. v. Alton City Bank, 25 Ill. 243; Dorchester Bank v. New England Bank, 1 Cush. 177. See the cases cited in notes 16 to 28 to this section.

⁵ Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276; In re State Bank, 56 Minn. 119; Power v. First Nat. Bank, 6 Mont. 251. But it would be against public policy for the bank to contract against liability for its own negligence, although it could contract against liability for its correspondent's negligence.

tween the different courts. The Supreme Court of Pennsylvania has been unable to agree with itself,⁶ but it is probably to be classed upon one-side of the question. The courts of the United States⁷ and of New York,⁸ New Jersey,⁹ Ohio,¹⁰ Indiana,¹¹ probably Pennsylvania,¹² Michigan,¹³ Montana¹⁴ and Minnesota,¹⁵ maintain the absolute liability of the first bank for all defaults of its correspondent banks. It need not be said that if the owner of the collection himself treats with the correspondent, he makes the correspondent his own agent. And the same result follows if he, himself, selects the correspondent. Many of these courts treat the question as one of delegation of power and not possession of power. The question is not whether the first bank is delegating any power, but rather, has it the power to appoint a sub-agent for the principal, if the relation is one of agency? The above cases make answer that it has no such power granted to it by the contract of collection, and therefore the initial bank is liable for all defaults of its correspondent, including a failure to pay over the proceeds. But the courts of Louisiana,¹⁶ Massachusetts,¹⁷ Iowa,¹⁸ Mississippi,¹⁹ Missouri,²⁰

See *Minneapolis Co. v. Metropolitan Bank*, 44 L. R. A. 504.

⁶ Compare *Mechanics' Bank v. Earp*, 4 Rawle, 384; *Bellmire v. United States Bank*, 4 Whart. 109, with *Wingate v. Mechanics' Bank*, 10 Pa. 104; *Bradstreet v. Everson*, 72 Pa. 124.

⁷ *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276; *Hoover v. Wise*, 91 U. S. 308; *Kent v. Dawson Bank*, 13 Blatch. 237. The English rule is the same.

⁸ *Castle v. Corn Exchange Bank*, 148 N. Y. 122.

⁹ *Davey v. Jones*, 42 N. J. Law, 28; *Titus v. Mechanics' Bank*, 35 N. J. Law, 588.

¹⁰ *Reeves v. State Bank*, 8 Ohio St. 465.

¹¹ *Tyson v. State Bank*, 6 Blackf. 225.

¹² *Siner v. Stearne*, 155 Pa. 662; *Bradstreet v. Everson*, 72 Pa. 124.

¹³ *Simpson v. Waldby*, 63 Mich. 439.

¹⁴ *Power v. First Nat. Bank*, 6 Mont. 251.

¹⁵ *Streissguth v. National Germ. Am. Bank*, 43 Minn. 50.

¹⁶ *Hum v. Union Bank*, 4 Rob. (La.) 109.

¹⁷ *Fabens v. Mercantile Bank*, 23 Pick. 330.

¹⁸ *Guelick v. National State Bank*, 56 Iowa, 434.

¹⁹ *Third Nat. Bank v. Vicksburg*, 61 Miss. 112.

²⁰ *Daly v. Butchers' Bank*, 56 Mo. 94.

Nebraska,²¹ Illinois,²² Connecticut,²³ Maryland,²⁴ Wisconsin,²⁵ Colorado,²⁶ Tennessee²⁷ and Kansas²⁸ affirm that the first bank is liable only for due care and diligence in the selection of a trustworthy correspondent; that it is given power by the very fact of the deposit for collection to employ sub-agents, who thereupon become the agents of the holder. This divergence of authority is exceedingly unfortunate, since in the states which hold this rule, if a party can bring his action in a United States court, the state rule will not be followed, and the practitioner is confronted with one kind of law in one court and another kind of law in another court, both within the same state, and with, in some cases, concurrent jurisdiction. The primary difficulty with this latter view is that it is based upon the idea that the collecting bank is an agent of the holder, but the collecting bank is bailee and its agents are its own agents.²⁹ What the collecting bank does is not in the principal's name, but in its own name as bailee and qualified owner of the paper.³⁰ In the next place, if the collecting bank is merely an agent, and sends the paper to another agent, the primary bank could claim no lien as against a garnishment directed to the secondary bank against the owner, and hence it would lose its banker's lien, although checks might have been drawn against the very collection and paid. In the third place this

²¹ First Nat. Bank v. Sprague, 34 Neb. 318.

²² Waterloo Milling Co. v. Kuester, 158 Ill. 259. See § 186, note 2.

²³ East Haddam Bank v. Scovil, 12 Conn. 303.

²⁴ Citizens' Bank v. Howell, 8 Md. 530.

²⁵ Stacy v. Dane Co. Bank, 12 Wis. 629.

²⁶ Bank v. Burns, 12 Colo. 539.

²⁷ Bank of Louisville v. Bank, 8 Baxt. 101.

²⁸ Bank v. Ober, 31 Kan. 599.

²⁹ It is unfortunate that the question has been considered one of

agency. Had it been discerned to be a bailment, the difficulty would not have resulted. See § 171, *ante*.

³⁰ No one probably would dispute that, if the paper were deposited as collateral security, a typical bailment, and the bank proceeded to collect it under a power, the agents used in the collection, whether banks or individuals, would be the agents of the bailee. It is concededly true in the case of common carriers that the successive carriers, unless the contract is special, are agents of the initial carrier.

view requires the holder of a collection, in order to protect himself fully, to ascertain the name of the correspondent bank and delay the collection until he can acquire satisfactory information. This argument *ab inconvenienti* ought to be controlling in the absence of some imperative rule of law. There are certain other states which, adopting the rule that the primary bank is not liable in general for the acts of the correspondent bank, yet claim the rule to be that, if the payee resides at the place where the collecting bank is located, that bank is liable for the acts of its correspondent at all events.³¹ It is hardly necessary to add that the correspondent bank is liable to whomever the particular rule adopted makes its employer.³²

§ 182. Liability of bank for notary.—If the deposit of paper for collection in a bank is a bailment, it follows necessarily that the default of the notary to which the bank confides the performance of some duty concerning the paper for the bank is the default of the bank, and so some cases hold;¹ but the great weight of authority is otherwise, and it is held that if the bank shows due care and diligence in the selection of a notary it has discharged its whole duty.² Log-

³¹ *Ætna Ins. Co. v. Alton City Bank*, 25 Ill. 243; *Bank of Louisville v. Bank of Knoxville*, 8 Baxt. 101; *Stacy v. Dane Co. Bank*, 12 Wis. 629, and a number of the cases cited in the preceding note recognize this distinction. If the correspondent resides in the same place, he is a servant of the bank; but if he resides in another place, he is an agent of the holder. There is no reason in the distinction. The courts see the wrong of the rule when applied to a home collection, but are unable to see it when applied to a collection to be made at a distance.

³² To the first bank: *Merchants' Bank v. Stafford Nat. Bank*, 44

Conn. 565; *Locke v. Merchants' Nat. Bank*, 66 Ind. 353; *First Nat. Bank v. Mansfield Sav. Bank*, 3 Ohio Dec. 141. Yet, if the first bank is bailee, it may sue and recover for the negligence up to the whole loss, even in those states which say that the correspondent bank is the agent of the holder. So the first case in this note holds.

¹ *Ayrault v. Pacific Bank*, 47 N. Y. 570; *Davey v. Jones*, 42 N. J. Law, 28.

² *Britton v. Nicholls*, 104 U. S. 757 (but see this case explained, 112 U. S. 284); *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648; *Agric. Bank v. Comm. Bank*, 15 Miss. 592 (this case contains some admirable *dicta* for drinking men); *Bellmire*

ically those courts which hold a bank responsible for the defaults of its correspondent bank ought to hold a bank liable for the acts of its notary,³ unless the fact that the notary is a public officer is entitled to a controlling consideration; but even then the exemption ought to be allowed only as to those duties which a notary must perform, and which are not merely ministerial. It is said in one court that if the bank makes use of its own notary it is not liable,⁴ but other cases assert that this is a good reason for making it liable.⁵

§ 183. Waiver of negligence.—Where the collecting bank or one of its agents, where it is held liable for the acts of its agents, has been guilty of negligence or of improper conduct in the making of the collection, the owner may waive his right to claim anything therefor. But this rule is governed by the general rule applicable to all classes of ratification—the act must be done with knowledge of the circumstances.¹ But if the bank returns a part of the proceeds of the collection and a note for the balance thereof and the owner accepts it, he thereby waives any right which he has to object to the bank's conduct.² But if he withdraws the collection after the bank has been guilty of negligence, he does not thereby waive the bank's liability.³ Nor does the drawer of a bill, by paying to the payee in ignorance of the negligence of the bank, waive his claim upon the bank.⁴ If the bank has failed to present the paper, instructions given by

v. Bank of U. S., 4 Whart. 105; Inst., 38 Mo. 60; Wood River Bank Stacy v. Dane Co. Bank, 12 Wis. 629; First Nat. Bank v. Butler, 41 Ohio St. 519; Bank of Louisville v. Bank of Knoxville, 8 Baxt. 101.

³The same result follows if the collection is considered to be a bailment.

⁴Baldwin v. State Bank, 1 La. Ann. 13.

⁵Gerhardt v. Boatmen's Sav. Commerce, 24 Md. 12.

v. First Nat. Bank, 36 Neb. 744.

¹Roanoke Nat. Bank v. Hamberck, 82 Va. 135.

²Hughes v. Neal Banking Co., 97 Ga. 383. Or accepts check. Hazlett v. Comm. Nat. Bank, 132 Pa. 118.

³Branch Bank v. Knox, 1 Ala.

148.

⁴Merchants' Bank v. Bank of

the owner to protect it are not a waiver of the bank's negligent failure.⁵

§ 184. Actions for negligence.—The bank of primary collection in the states which recognize its liability for the acts of its correspondent banks may maintain an action against the last-named bank for negligence,¹ but the holder of the paper cannot.² In those jurisdictions which hold the rule that the correspondent bank is the agent of the owner of the paper, the owner may sue the correspondent bank for negligence;³ and this would seem to be the proper rule, even though the fact of the collection being for the owner, and not for the first bank, did not appear, as it would not, if the owner indorsed generally to the first bank. The real owner of the paper may maintain the action against the collecting bank, even though the paper had been pledged and the paper was not placed in the bank for collection by the pledgee.⁴ Where note was returned to the owner after the negligence occurred, it is of course not necessary to show a redelivery to the bank.⁵ The fact that the note was received for collection by the bank is sufficient proof of the general contract of collection,⁶ and unless it is sought to charge the bank with knowledge of special instructions, it is not necessary to prove them or to allege them. It is said in one case that only that part of the contract of which the breach occurred needs to be set out in the pleading.⁷ The pleading and the proof

⁵ First Nat. Bank v. Price, 52 Iowa, 570. Bank, 44 Conn. 565, and note 32 to § 181.

¹ See cases cited in note 32 to § 181, *ante*.

² Montgomery Co. Bank v. Albany City Bank, 7 N. Y. 459. Bank of Washington v. Triplett, 1 Pet. 25, has a *dictum* to the contrary. Even in those states which consider the correspondent bank as the agent of the primary bank, the latter bank ought to have an action against its correspondent for negligence. See Merchants' Bank v. Stafford Nat.

³ All the cases recognize this principle.

⁴ Bank of Utica v. McKinstler, 11 Wend. 473.

⁵ Merchants' Bank v. Bank of Commerce, 24 Md. 12.

⁶ Jagger v. National Germ. Am. Bank, 53 Minn. 386.

⁷ American Exp. Co. v. Pinckney, 29 Ill. 392. This case shows clearly the fact that a collection is a bailment from the form of the plead-

must show damage.⁸ If it is alleged that certain parties to the paper were discharged, it must be alleged and proven that those remaining liable are not good and that the parties discharged were.⁹ If the negligence complained of was a delivery to the payer, the loss of the claim must be averred as a consequence.¹⁰ The allegation of a consideration is not material where an acceptance of the collection is averred.¹¹ It certainly is not necessary where the action is one against the bank for conversion.¹²

§ 185. Matters of proof.—Where the negligence complained of consists in a loss of the paper in transmitting it, the burden is upon the bank to show that the loss happened without its fault.¹ There arises, upon the fact being shown, a presumption of carelessness.² Even though the paper was lost without its fault, the bank must show that it used due diligence in ascertaining the fact.³ Where the bank has failed to present the check or other paper for payment or has failed to give notice of non-payment, the fact of the indorser's insolvency ought to be proof in mitigation of damages.⁴ It has been held that the burden of proof is upon the

ing. First there is alleged the fact of deposit and acceptance for collection, next the duty, and then the breach of the duty. Yet the court with this before it talks about the contract, as if it were an express contract, and not the clearest case possible of a *quasi*-contract. See note 2 to § 186, and note 22 to § 181.

⁸ *Morris v. Eufala Bank*, 106 Ala. 383; *Farmers' Bank v. Newland*, 97 Ky. 464; *Finch v. Karste*, 97 Mich. 20.

⁹ *Bank of Mobile v. Huggins*, 3 Ala. 206. But the better rule would be that the insolvency of parties discharged goes in mitigation of damages. *Stowe v. Bank of Cape Fear*, 3 Dev. 408; *Borup v. Nininger*, 5 Minn. 523.

¹⁰ *Farmers' Bank v. Newland*, 97 Ky. 464.

¹¹ The relation raises the duty. Special instructions and the posted terms of collection are material, since they may modify the relation. *Wingate v. Mechanics' Bank*, 10 Pa. 104.

¹² *Keyes v. Bank of Hardin*, 52 Mo. App. 323.

¹ *Chicopee Bank v. Philadelphia Bank*, 8 Wall. 641.

² *American Exp. Co. v. Parsons*, 44 Ill. 312.

³ *First Nat. Bank v. First Nat. Bank*, Fed. Cas. No. 4810; *Shepley v. Bowery Nat. Bank*, 59 N. Y. 485.

⁴ *Coghlan v. Dinsmore*, 9 Bosw. 453; *Borup v. Nininger*, 5 Minn. 523. But *First Nat. Bank v. Fourth Nat.*

plaintiff to show in regard to a check that the drawee was solvent and the check collectible.⁵ And where the negligence alleged is a failure to present a check which was given for a draft, whereby the payment of the check was lost, the holder must show that the drawer of the draft became insolvent.⁶ The fact that checks of the drawer were paid up to the day after the check should have been presented is proof that the check would have been paid if presented at the proper time.⁷ In proving insolvency of a particular person a return of *nulla bona* against him is competent proof,⁸ or a general reputation of insolvency within a reasonable time after the maturity of the paper on which he is liable.⁹ But the fact that a person was in embarrassed circumstances does not necessarily indicate insolvency.¹⁰ Other questions that have arisen are noticed in the note.¹¹

§ 186. Measure of recovery.—Where paper is a total loss the measure of recovery would be the face value of the

Bank, 77 N. Y. 320, and Bamberger v. Bank of Tupelo, 15 Ky. Law R. 361, are to the effect that plaintiff must show an actual loss.

⁵ Sahlien v. Bank of Lonoke, 90 Tenn. 221. Compare Lienau v. Dinsmore, 3 Daly, 365.

⁶ First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320; Citizens' Nat. Bank v. Third Nat. Bank, 49 N. E. R. 171.

⁷ First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320.

⁸ Eschelberger v. Pike, 22 La. Ann. 142.

⁹ West v. St. Paul Nat. Bank, 54 Minn. 466.

¹⁰ Steele v. Russell, 5 Neb. 211. Just when a person becomes so embarrassed as to be insolvent is a matter of some apparent doubt in Nebraska.

¹¹ Payments made on the collection after the negligence occurred are proper evidence in mitigation

of damages. Borup v. Nininger, 5 Minn. 523. But the case of Fifth Nat. Bank v. Ashworth, 123 Pa. 212, decides that where a collecting bank has accepted a cashier's check for a collection, and thus made the collection its own, payment by the drawer of the check to the holder is no defense in favor of the bank against the holder of the check suing it for negligence. The possession of collateral by the holder is mitigating evidence. Mott v. Havana Bank, 22 Hun, 354. But not the fact that on a foreclosure sale the holder bought in real property for less than it was worth. West v. St. Paul Nat. Bank, 54 Minn. 466. A judgment in another state exonerating the drawer is conclusive as to the drawer's liability when the payee sues the bank. First Nat. Bank v. Fourth Nat. Bank, *supra*.

paper where there was no proof of the insolvency of the maker and of the other parties liable upon it.¹ The same rule would apply where negotiable paper is lost in the course of transmission,² but not, of course, to non-negotiable paper. The other matters bearing upon the amount of the recovery will be found treated in the preceding section.

§ 187. Rights in proceeds.—It is apparent that this question may take different phases. First, we may consider the question as between the owner and the bank to which he consigns the paper for collection. This bank, for want of a better term, we will call, after the analogy of carriers, the initial bank. The situation as to the holder after collection of the proceeds and the final crediting of them in the initial bank differs from the situation before being credited there. If the proceeds have been collected and credited, the relation resulting between the depositor and the bank will vary with the instruction given or the course of dealing between the parties. It may also be varied by the fact that the initial bank was insolvent when it received the collection. Before collection has been made, the holder may have rights which are controlled by the form of indorsement to the initial bank or the form of its communication of the paper to a correspondent bank. Between the banks doing the collecting, the initial bank, when the paper is credited to it, will be in the same situation relative to the secondary bank as the holder occupies toward the initial bank when it has credited the proceeds after collection to him. The situation of the secondary bank may vary with its claims against the initial bank and the nature of the indorsements on the paper. The whole situation as between the various parties will be subject to a sudden change upon

¹ *Wingate v. Mechanics' Bank*, 10 Pa. 104.

² *Am. Exp. Co. v. Parsons*, 44 Ill. 312. This case is remarkable for two reasons: (1) In Illinois an express company collecting paper is liable for all connecting companies,

which is the exact contrary of the rule applied here to banks; and (2) the court recognizes that a deposit for collection is a bailment when given to an express company. See note 7 to § 184, *ante*.

the insolvency of any of the parties. These various questions will be considered in the order of the holder's rights, the initial bank's rights, and the correspondent bank's rights in the proceeds. Most of the law upon this subject has been produced in the last decade or two.

§ 188. **The rights of the owner of collection.**—As we have heretofore said,¹ the deposit of paper for collection in a bank creates the relation between the banker and customer of bailor and bailee. It is submitted that this is the only relation that will answer the situation. The bank is owner against all the world except the true owner. It is liable for negligence in an action at law. The owner can follow the proceeds of the collection in an action at law. The initial bank is liable for its correspondent's defaults, except in some jurisdictions, which recognize, however, that the bank can sue as owner itself, although it is not the owner, because it can charge off a credit given. What legal relation except bailment will answer these conditions? If, however, the paper be sold or discounted to the bank, it is, of course, not deposited for collection.² The contract of bailment may be either the one which results from custom recognized as a rule of law, or it may be that customary duty modified by an express agreement or by a course of dealing between the bank and its depositor. This fact is material as to the relation which results upon the completion of the collection;³ it may also be material as defining the duty of the bank in making the collection, or its responsibility if the collection be not made. But whatever the relation between the holder of the collection and the bank in which he deposits it, the depositor, when placing the paper in the bank, must indorse it. This indorsement may be for credit or for collection, or for collection and credit, or for account. The

¹ See § 133, *ante*.

² This view must be taken in regard to those cases which affirm that all title passes to the bank upon a deposit for credit. See § 133, *ante*, and *Fourth Nat. Bank v.*

Mayer, 89 Ga. 108. But these courts involve themselves in a flat contradiction by allowing the credit to be revoked for non-collection.

³ See § 133, *ante*.

form of indorsement is not material between the bank and the customer, if there is an agreement or understanding between the parties, except that it may be evidence as to the relation between them. The actual agreement governs. But the indorsement is exceedingly material where the collection is to pass through other banks. Whether the paper is indorsed for collection or credit, the bank may permit the deposit that requires collection to be checked against. Taking first a deposit for credit where the responsibility on the paper remains with the customer, the beneficial ownership of the proceeds after collection and the ownership of the paper before collection remains with the depositor until, at least, the reception of the proceeds by the bank dealing immediately with him.⁴ It matters little whether the relation is called that of bailor to bailee, or that of *cestui que trust* to trustee, or that of agent to principal, except that the last two views introduce serious difficulties as to procedure. Being the ultimate owner, the depositor of the paper can claim it against any one who cannot show a better right. A better right can be shown by any correspondent bank having a lien on the proceeds which received the paper as the property of the bank transmitting to it, when it was not put upon notice that the paper was held by the initial bank for collection and not as owner.⁵ An original indorsement for collection, or any indorsement for collection or for account prior to the indorsement to it, is notice that the trans-

⁴ *Evansville Bank v. German Am. Bank*, 155 U. S. 556; *Beal v. Somerville*, 50 Fed. R. 647, 5 U. S. App. 14; *Beal v. National Ex. Bank*, 55 Fed. R. 894, 5 U. S. App. 376. These cases must be taken to have settled the law contrary to the view held by the text books, which asserted a contrary principle. But in those states which hold that a deposit for credit passes title to the bank, the proceeds are lost to the depositor

(see § 133, *ante*), unless he treated with the correspondent bank. *Pickering v. Cameron*, 103 Iowa, 186.

⁵ *Bank of Metropolis v. New England Bank*, 1 How. 234, 6 How. 212; *Blaine v. Bourne*, 11 R. I. 119; *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *City Bank v. Weiss*, 67 Tex. 331; *Lindauer v. Fourth Nat. Bank*, 55 Barb. 75; *Sweeney v. Easter*, 1 Wall. 166; *Hackett v. Reynolds*, 114 Pa. 328.

mitting bank is not the owner;⁶ so is notice communicated in any other way.⁷ But such correspondent bank by its agreement with its transmitting bank cannot control the effect of such an indorsement or other notice.⁸ If it has a lien it is only to the extent of a credit allowed, or detriment suffered by it on the credit of this particular paper,⁹ unless it has a lien by agreement or by a course of dealing. The next person that may be able to claim a lien on the paper as against the owner is the bank which deals directly with him. This bank has a lien or a set-off upon the proceeds of the collection for any matured claim which it may have against the depositor of the paper,¹⁰ and in most jurisdictions a set-off, where the claim is unmatured and the depositor insolvent,¹¹ provided the proceeds of the collection in the initial bank would become a general deposit of the holder.¹² It would also necessarily have a lien for any credit allowed the holder upon the particular paper deposited for collection. But whenever in the chain of collecting banks the proceeds are lawfully taken by a bank for a claim owed to it by its predecessor in the collection, that predecessor becomes at once liable to its immediate predecessor as for the

⁶ *First Nat. Bank v. Bank of Monroe*, 33 Fed. R. 408; *Evansville Bank v. Germ. Am. Bank*, 155 U. S. 556. It is held that an indorsement for collection and credit does not pass title to the bank, even though it be credited as cash. *Armstrong v. National Bank*, 90 Ky. 431. But every indorsement for credit to any bank, not the one on which the paper is drawn, shows that very same fact.

⁷ See § 133, *ante*.

⁸ *Hutchins v. Manhattan Co.*, 29 N. Y. Supp. 1103.

⁹ *Cody v. City Nat. Bank*, 55 Mich. 379; *McBride v. Farmers' Bank*, 26 N. Y. 450; *Dod v. Fourth Nat. Bank*, 59 Barb. 265; *Comm. Bank v. Ma-*

rine Bank, 3 Keyes, 337. The case of *Wyman v. Colo. Nat. Bank*, 5 Colo. 30, wrongly held an overdraft already existing sufficient. *Milliken v. Shapleigh*, 36 Mo. 596, is to the contrary. *Carrol v. Exc. Bank*, 30 W. Va. 518, holds that general balances are sufficient, but *Bank of Syracuse v. Wis. Ins. Co.*, 12 N. Y. Supp. 952, contradicts it. The New York cases do not recognize an existing debt as sufficient.

¹⁰ *Greene v. Jackson Bank*, 18 R. I. 779; *In re Armstrong*, 41 Fed. R. 381.

¹¹ See § 140, *ante*.

¹² The rule as to application applies only to general deposits.

reception of the proceeds;¹³ and the same result follows where a bank receives the proceeds by a lawful credit to it; and whenever in the chain of collection any bank has parted with the proceeds, either by transmission or credit lawfully given, its connection with the collection has ceased.¹⁴ But as between banks it should not be forgotten that they are governed by the same rules as apply to the original depositor and the initial bank, as to notice by the form of indorsement to itself or to some of its predecessors; and where the bank receiving the paper has the right to assume that it is the property of the bank transmitting to it, yet it has no lien except where it grants a credit upon the particular paper, or has one by an agreement or course of dealing. The third class of persons who may show a better right may be assignees or garnishers of the owner of the paper.¹⁵ The case of assignees calls for no particular mention. They gain the rights of their assignors and no more; and in order to protect themselves should give notice to any bank which they desire to be affected, unless notice to the first or initial bank

¹³ The initial bank becomes responsible to the holder because it obtains the proceeds by a credit which if lawfully given is precisely the same as the receipt of so much actual money. See *In re Madison Bank*, 5 Biss. 515. But it should be remembered that if the deposit for collection was taken by a bank known to its officers to be insolvent, a fraud was committed upon the depositor, and a credit by one bank to another bank would not relieve it from its liability to the owner, unless it could claim to be a *bona fide* holder of the proceeds. See note 25, *infra*.

¹⁴ This principle is recognized in most of the cases. See *Evansville Bank v. Germ. Am. Bank*, 155 U.S. 556. But the crediting cannot be made before payment. *Jones v. Kil-*

breth, 49 Ohio St. 401. One case holds that if no collection is made except by a credit allowed the debtor on an overdraft, the collection is not paid. *Kinney v. Paine*, 68 Miss. 258. This is a sound decision as applied to a credit allowed in an insolvent bank. Other cases hold that if a remittance is made by exchange, which is a bank check, the collection is complete as to the remitting bank. *Aken v. Jones*, 93 Tenn. 353; *Sayles v. Cox*, 95 Tenn. 579. But this is true only when the exchange is paid. As to the relation that results upon collection, compare *Billingsley v. Pollock*, 69 Miss. 659; *Bowman v. First Nat. Bank*, 9 Wash. 614, with *Hunt v. Townsend*, 26 S. W. R. 310.

¹⁵ As to assignees see *Greene v. Jackson Bank*, 18 R. I. 779.

would be considered notice to all the others, where they are considered successive bailees or agents under the initial bank. The garnishment may be either upon the correspondent bank or the initial bank. If it be upon the initial bank before it has received the proceeds, the holder of the collection may protect himself by reclaiming the proceeds from the correspondent bank which holds them. But in any event the garnisher gets no better title or right than the holder had, and the garnishment is therefore subject to any claims which the correspondent bank or the initial bank may have upon the paper. Whether the proceeds would be subject to garnishment at all or not must depend upon the terms of the particular governing statute.¹⁶ But it can be said that at common law, certainly, it is not subject to attachment or execution by direct levy.¹⁷ But if the deposit for collection be subject to check, there ought to be no question that it is not subject to garnishment until the proceeds have been received by the initial bank and there credited or held for the depositor.¹⁸ But where the deposit is for collection merely and not checked against, there seems to be no good reason why the proceeds could not be garnished in the hands of any corre-

¹⁶ Ordinarily garnishment is for the purpose of reaching those assets of the debtor which are not capable of manual delivery. Such would be a bailor's interest where the bailee was in possession and entitled to the possession. The bailor's interest is recognized as attachable in *Warner v. Fourth Nat. Bank*, 115 N. Y. 251, but if it be attachable, it could only be by process of garnishment under most systems. Where a chose in action is garnished the usual course is to garnish the debtor. Manual delivery of the document itself would not necessarily confer any lien against the debtor. This question must be settled by reference to special treatises upon the

subject of attachment and garnishment. The leading authorities upon the question will be found in note 20, *infra*. But it is such a simple matter for the holder of the collection to avoid the effect of a garnishment, and it is so difficult for the creditor, unless he can obtain confidential information from the banks, that the whole inquiry can hardly be considered practical.

¹⁷ It is not subject to execution because not capable of being taken possession of as against the bailee in possession with a right to retain possession.

¹⁸ *Fourth Nat. Bank v. Meyer*, 89 Ga. 108.

spondent bank.¹⁹ But the general principle unquestionably is that uncollected paper is not subject to garnishment.²⁰ When the collection comes into the hands of the primary bank it becomes subject either to garnishment, if a general deposit or if a special deposit, and in some cases might be reached by direct levy.²¹ But the creditor may proceed, if he is otherwise entitled, in equity, and by means of injunctive orders obtain what relief could be granted him in the particular case.²² When the proceeds have been received by the primary bank they become a general deposit to the credit of the depositor,²³ unless by special agreement or by a course of dealing they become a special deposit,²⁴ or unless the collection was received by the primary bank under such circumstances that it became a constructive trustee for the depositor, as, for example, by receiving the deposit when it was known to its officers to be insolvent.²⁵ In this latter

¹⁹ *Freeman v. Exchange Bank*, 87 Ga. 45; *Naser v. First Nat. Bank*, 36 Hun, 343.

²⁰ *Moore v. Goddard*, 17 N. E. R. 535; *Hancock v. Colyer*, 99 Mass. 187; *Levisohn v. Wagner*, 76 Ala. 412; *Howland v. Spencer*, 14 N. H. 580; *Fuller v. Jewett*, 37 Vt. 473; *Bowker v. Hill*, 60 Me. 172; *Groshens v. Farmers' Bank*, 13 Conn. 104; *Moore v. Pillow*, 3 Humph. 448; *Allen v. Erie City Bank*, 57 Pa. 129; *Deacon v. Oliver*, 14 How. 610, *semble*; *Ellison v. Tuttle*, 26 Tex. 283. The case of *Trunkey v. Crosby*, 33 Minn. 464, seems to be *contra*.

²¹ See note 16, *supra*.

²² See *Louisiana Ice Co. v. State Nat. Bank*, 1 McGlouin, 181.

²³ *Comm. Bank v. Armstrong*, 148 U. S. 50; *Anheuser-Busch Ass'n v. Clayton*, 56 Fed. R. 759, 13 U. S. App. 295. See § 133, *ante*.

²⁴ *Wallace v. Stone*, 107 Mich. 190; *Hunt v. Townsend*, 26 S. W. R. 310;

Continental Nat. Bank v. Weems, 69 Tex. 489; and see § 133, *ante*.

²⁵ *St. Louis Ry. Co. v. Johnston*, 133 U. S. 566; *Peck v. First Nat. Bank*, 43 Fed. R. 357. *Imp. & Trad. Bank v. Peters*, 123 N. Y. 272, recognizes the principle, but the case is not correctly decided. A primary bank in an insolvent condition received a collection. It was apparently indorsed by the holder for credit. Therefore the primary bank became a trustee. It sent the collection to its correspondent. The correspondent collected and remitted by credit to the insolvent bank. It does not seem to have given the insolvent any credit upon the strength of the paper. Yet it was held that the holder could recover from the correspondent bank only the balance due from the correspondent to the insolvent. This case is wrong because the correspondent bank was not a *bona fide*

case the relation of debtor and creditor does not result, because the act of the bank was a gross fraud.²⁶ If for any reason the correspondent bank fails to pay over the funds collected, the primary bank is liable in those jurisdictions which recognize the rule,²⁷ but in other states the holder must sue the correspondent bank.²⁸ The primary bank having received the funds must perform its duty by crediting them or paying them over. It cannot refuse because the paper collected was given to defraud creditors, unless it was a creditor;²⁹ but it may refuse if it is enjoined from so doing by some legal process,³⁰ or if the true owner has given it notice not to pay over the proceeds.³¹ The bank must pay to a third party if it has been so directed.³² If it pays a collection by mistake it may recover the payment,³³ unless the collection was upon itself.³⁴ But if it pays a collection on itself it may set up, if such was the fact, that the payment was merely provisional.³⁵ If the collection is upon another bank it may recover the amount if it pays to the holder through a mistake in thinking the collection paid,³⁶ even though the maker or drawer of the paper is insolvent.³⁷ When, through mistake, it has paid by a credit it may re-

holder. But the question was not in the case because the party prejudiced by this ruling in the lower court did not appeal.

²⁶ There is no question that the relation does not become debtor and creditor if the remittance is made to the primary bank after notice of insolvency. See next section. Hence the same must be true where the primary bank never became the bailor on account of its fraud in concealing its insolvent condition.

²⁷ See § 181, *ante*.

²⁸ See § 181, *ante*.

²⁹ *First Nat. Bank v. Lippel*, 9 Colo. 594.

³⁰ *Louisiana Ice Co. v. State Nat. Bank*, 1 McGloin, 181.

³¹ *First Nat. Bank v. Bache*, 71 Pa. 213; *Union Bank v. Johnson*, 9 Gill & J. 297.

³² *Wiedsport Bank v. Park Bank*, 2 Robt. 418. Or it may pay to the one indicated by a course of dealing with the bank. *Craig Medicine Co. v. Merchants' Bank*, 59 Hun, 561.

³³ See the cases cited in the following notes.

³⁴ See *Whiting v. City Bank*, 77 N. Y. 363, and see § 158, *ante*.

³⁵ *First Nat. Bank v. Devenish*, 15 Colo. 229.

³⁶ *First Nat. Bank v. Behan*, 91 Ky. 560; *Mechanics' Bank v. Earp*, 4 Rawle, 384.

³⁷ *De Mayer v. State Nat. Bank*, 8 Neb. 104.

voke the credit,³⁸ or if the proceeds have passed back to holder it may recover from the holder.³⁹ A depreciation in the medium of payment must fall on the bank which at the time holds the proceeds.⁴⁰

§ 189. Rights to proceeds as between banks.—Where the paper is notice that it was indorsed for collection,¹ or where the correspondent bank has other notice of the fact,² the correspondent bank can retain no portion of the proceeds as against the holder for the debt of the remitting bank.³ But where the paper does not so indicate and it has no notice, it may hold the proceeds against the holder for a claim due it from the remitting bank which has been contracted on account of the paper.⁴ As against the remitting bank it may, of course, hold the proceeds, or if it credits them by mistake it may recover from the remitting bank,⁵ or from the holder if he has received the proceeds.⁶ Where the proceeds of the collection have been credited by the correspondent bank to the initial bank, the latter bank is simply a general creditor, unless the former agreed to hold the proceeds as the property of the initial bank.⁷ As long as it holds the proceeds of a collection in its hands it is responsible to the true owner. It cannot cut off the true owner's claim by paying to some one else, even the clearing-house.⁸

³⁸ *Mechanics' Bank v. Earp*, 4 Rawle, 384; *Union Nat. Bank v. Sixth Nat. Bank*, 43 N. Y. 452.

³⁹ *Bank of Orleans v. Smith*, 3 Hill, 560. But acquiescence in the payment will be a waiver of the right to recover. *Harley v. Eleventh Ward Bank*, 76 N. Y. 618.

⁴⁰ *Marine Bank v. Fulton Bank*, 2 Wall. 252. As to taking in payment Confederate money, see *Strauss v. Bloom*, 18 La. Ann. 48.

¹ See last section, notes 5, 6 and 7.

² See last section, notes 5, 6 and 7.

³ See last section, notes 5, 6 and 7.

⁴ See last section, notes 5, 6 and 7.

⁵ *First Nat. Bank v. Behan*, 91 Ky. 560.

⁶ *Bank of Orleans v. Smith*, 3 Hill, 560. Compare *Canterbury v. Bank of Sparta*, 91 Wis. 53. The same result is attained by revoking a credit. When forged paper is remitted for collection, see § 155, *ante*, ⁷ *Continental Nat. Bank v. Weems*, 69 Tex. 489; *Hunt v. Townsend*, 26 S. W. R. (Tex.) 310. In the latter case there was an agreement implied from a course of dealing.

⁸ *First Nat. Bank v. Bache*, 71 Pa. 213; *Union Bank v. Johnson*, 9 Gill & J. 297. It is bound by an injunc-

§ 190. **Insolvency as affecting proceeds.**—As we have already seen, the insolvency of a bank revokes its power as to a collection.¹ The principle applies also as between banks which are in correspondence as to a collection in remitting the proceeds.² If the person liable upon the paper has paid the collection to the collecting bank, or to one of its correspondents or sub-correspondents, the owner of the collection is in the following situation in a case of insolvency: If it be the initial bank which becomes insolvent, with the funds of collection having reached it, he is a general creditor or a special depositor, as his contract of collection or course of dealing may determine.³ If the proceeds have not been received by the initial bank, he is fully protected against any payment to it by a correspondent bank;⁴ for if the correspondent bank tries to remit by credit to the insolvent bank, the credit is wholly nugatory as to the owner, whether the correspondent bank had notice of the insolvency or not.⁵ If it does actually remit the proceeds in the form of money or a draft, the insolvent bank or its receiver or assignee becomes a trustee for the owner.⁶ But the owner is exposed to the danger, if his indorsement to the initial bank was for

tion against the initial bank if it has notice. *Louisiana Ice Co. v. State Nat. Bank*, 1 McGloin, 181.

¹ See § 174, *ante*, and *Evansville Bank v. Germ. Am. Bank*, 155 U. S. 556.

² See the last case cited.

³ See § 133, *ante*.

⁴ *Evansville Bank v. Germ. Am. Bank*, 155 U. S. 556; *Beal v. National Ex. Bank*, 55 Fed. R. 894, 5 U. S. App. 376; *National Ex. Bank v. Beal*, 50 Fed. R. 355; *Bank of Clarke Co. v. Gilman*, 152 N. Y. 634; *Peck v. First Nat. Bank*, 43 Fed. R. 357. The case of *Ayres v. Farmers' Bank*, 79 Mo. 421, is wrong on this point; and *Castle v. Corn Ex. Bank*, 148 N. Y. 122, is wrong because the initial bank was insolvent and the sec-

ondary bank credited it, even after knowledge of the fact. The opinion misses this point and is otherwise lamentably feeble and inconclusive. *Branch v. U. S. Nat. Bank*, 70 N. W. R. 34, is correct on the principle.

⁵ *Evansville Bank v. Germ. Am. Bank*, 155 U. S. 556.

⁶ In *re Armstrong*, 33 Fed. R. 405; *Beal v. Somerville*, 50 Fed. R. 647; *Commercial Nat. Bank v. Armstrong*, 148 U. S. 50; *Fifth Nat. Bank v. Armstrong*, 40 Fed. R. 46. The case of *First Nat. Bank v. Armstrong*, 39 Fed. R. 231, was wrongly decided. *Anheuser-Busch Ass'n v. Clayton*, 56 Fed. R. 759, recognizes the rule. The insolvent bank having received the proceeds by cred-

credit or general, and the correspondent had no other notice, that the correspondent bank may hold the proceeds for the initial bank's debt to it, which it could do only when it had given credit on this particular paper or has a lien by agreement or a course of dealing.⁷ If the primary bank does obtain the benefit of the proceeds of his paper by a lawful retention thereof by a correspondent bank, the owner has either a claim as general depositor,⁸ or as special depositor, dependent upon the terms of his agreement for collection or the course of dealing,⁹ or dependent upon the fact that the initial bank was insolvent when it took the deposit for collection.¹⁰ But in those states which consider a deposit of paper for credit a transfer to the initial bank, the holder is only a general creditor, with a deposit such as any other depositor has. If it is the secondary bank that becomes insolvent with the right to retain the proceeds as against the initial bank, the holder is protected, because the initial bank has received the proceeds. If the secondary bank becomes insolvent before the proceeds of the collection are paid to it by a sub-correspondent bank, he has the same protection that he has against the secondary bank with the initial bank insolvent. If the secondary bank becomes insolvent having the proceeds of the collection in its hands, the holder is fully protected in those jurisdictions which recognize the responsibility of the initial bank for its correspondent bank's default.¹¹ In those states which deny this responsibility, he would have either a claim as general creditor or as special depositor, dependent upon the same conditions as would make him a special depositor in the initial bank,¹² except

iting the depositor cannot make him a general creditor. *Armstrong v. National Bank*, 90 Ky. 431.

⁷ See § 188, *ante*.

⁸ *Anheuser-Busch Ass'n v. Clayton*, 56 Fed. R. 759.

⁹ See § 133, *ante*.

¹⁰ See § 188, *ante*. The owner may always claim the thing obtained by the collecting bank instead of

money. *Germ. Am. Bank v. Third Nat. Bank*, Fed. Cas. No. 5359.

¹¹ See § 181, *ante*. But the primary bank would generally cause the owner of the collection to reclaim it from the insolvent secondary bank. It is liable itself. *First Nat. Bank v. First Nat. Bank*, 75 N. W. R. 843.

¹² If the primary bank held the

in those states which have the further rule that a deposit for credit is a transfer of the paper to the bank. But it would seem to be right to hold that if the secondary bank becomes insolvent in those states and has at the time the proceeds of collections in its hands, the real owner of the collection could claim that he was a special depositor in the secondary bank, whenever the initial bank can claim a special deposit owing to the form of the indorsements on the paper or other notice.¹³ The difficulty that arises in such cases shows the absurdity of the rule that the initial bank is not responsible for the correspondent bank's default. As between banks, if the primary bank becomes insolvent owing to the secondary bank, this latter bank with the proceeds of collection in its hands can hold them as against the initial bank,¹⁴ but the real owner can compel payment to himself, unless the secondary bank can show itself to be a *bona fide* claimant of the proceeds.¹⁵ If it cannot show itself to be a *bona fide* claimant, the owner of the collection will, of course, force it to make payment to him rather than trust himself to the chances of recovering from an insolvent bank.¹⁶ If it is the secondary bank that becomes insolvent having credited the proceeds of the collection to the primary bank, the latter bank has only the claim of a general depositor.¹⁷ If it

paper for collection, the so-called agent could get no better or higher right, except as a *bona fide* claimant for its own claims.

¹³ There seems to be no case except *Bury v. Woods*, 17 Mo. App. 245 (see also *Foster v. Rincker*, 4 Wyo. 484), which recognizes the rule. One case goes so far as to hold that crediting another bank is not paying it. *Boyken v. Bank of Fayetteville*, 118 N. C. 566. The decision is correct, no doubt, upon the whole question involved. This particular language is opposed to *First Nat. Bank v. Davis*, 114 N. C. 343.

¹⁴ In *re Armstrong*, 41 Fed. R. 381.

This is not a case of an illegal preference, because the collecting bank has a lien upon the proceeds. In this case the secondary bank simply credited the initial bank on what the latter owed to it.

¹⁵ See § 188, *ante*.

¹⁶ Such cases are *Evansville Bank v. Germ. Am. Bank*, 155 U. S. 556; *Imp. & Trad. Bank v. Peters*, 123 N. Y. 272.

¹⁷ *Continental National Bank v. Weems*, 69 Tex. 489. That it has been credited to the original depositor by the primary bank can make no difference. It has become responsible to him by having received the

can show, however, that the proceeds of the collection were to be held by the secondary bank as a special deposit for it, the initial bank may claim to be a special depositor,¹⁸ or if it can show that the secondary bank was insolvent when it took the deposit, the reason of the rule requires that the initial bank should be considered a special depositor.¹⁹ But there are some jurisdictions which hold the untenable rule, as we shall hereafter see, that although the owner of a collection can claim a trust by reason of the character in which a bank holds the proceeds of a collection, nevertheless if the trustee so called or bailee has been quick enough to mingle the trust fund with his own property the priority is lost. The doctrine needs but to be stated to show its essential unsoundness.²⁰

proceeds. The same principle governs the relation of the secondary bank to the primary that governs that of the primary bank to the holder of the paper.

¹⁸ *Continental National Bank v.*

Weems, 69 Tex. 489; *Hunt v. Townsend*, 26 S. W. R. 310.

¹⁹ See § 188, *ante*, as to this rule between depositor and primary bank. It would also apply as between banks.

²⁰ See §§ 343, 344, *post*.

CHAPTER IX.

LOANS AND DISCOUNTS.

§ 191. **Validity of loan.**—Unless something in the law or the charter forbids it, a bank may loan either upon personal¹ or real-estate security.² There have been in certain states banking schemes which compelled the bank to make loans to its stockholders,³ either upon real-estate security or upon the security of the stock in the bank.⁴ Such loans were a preferential lien upon the property mortgaged.⁵ Such schemes are now considered unsafe banking, and are rarely heard of, except in times of commercial depression, when crude visionaries revive them as if they were new devices.⁶ Where the statute forbids certain loans, either by implication or by positive enactment, the legal result must be ascertained in accordance with principles already pointed out.⁷ Some of these statutes are considered as existing for the pro-

¹ *Biscoe v. Tucker*, 11 Ark. 145.

² *Bank of Martinez v. Hemme Co.*, 105 Cal. 376. But where a bank was permitted to loan to a planter, farmer, miner, manufacturer or other person, a merchant on the principle of *noscitur a sociis* was held not to be included. *Hanover v. Williams*, 79 N. C. 129. This is a curious appearance of the vulgar superstition that only those classes which put labor upon a thing by producing it are producers. Of course, labor in getting a thing to a proper market and in place for a sale is just as productive.

³ Instances that may be profitably studied by the vendors of populist

nostrums may be found in Louisiana, Florida and Arkansas. See *Dawson v. Real Estate Bank*, 5 Ark. 283, and the cases in the next two notes.

⁴ Real-estate security: *Citizens' Bank v. Nicolas*, 3 La. Ann. 112; *Mitchell v. Logan*, 34 La. Ann. 998; *Union Bank v. Parkhill*, 2 Fla. 660. Stock of the bank: *Nutt v. Citizens' Bank*, 22 La. Ann. 346; *Mitchell v. Logan*, 34 La. Ann. 998.

⁵ *Haynes v. Courtney*, 15 La. Ann. 630; *Nutt v. Citizens' Bank*, 22 La. Ann. 346.

⁶ Government banks to lend to farmers are excellent specimens.

⁷ See §§ 32 and 33, *ante*.

tection of the bank,⁸ and others for the protection of borrowers from the bank.⁹ Where the statute is made for the protection of the loaning bank, there is no difficulty in permitting a recovery of the loan by the bank, even though the note be void.¹⁰ But there is a case which is under a statute making the loan void, and another case which cannot be reconciled with well-understood principles.¹¹ The statutes which are made for the protection of borrowers as against the bank will be considered under the head of usury.¹² But in order that a loan may be enforced against either the surety or the maker of the note, it must appear that the note was actually transferred to the bank.¹³

§ 192. *Collaterals.*—Whether a note taken for a loan be legal or illegal, the loan itself being a good ground of recovery the collaterals therefor may be enforced.¹ It makes little difference in the result upon what principle this relief is granted. A consistent ground would be to say that the depositor of the collaterals cannot object so long as he does not perform his legal and moral duty by paying the loan.

⁸ Statutes which forbids loans to directors, or to individuals, or upon certain security.

⁹ Statutes against usury.

¹⁰ *Nielsville Bank v. Tuthill*, 4 Dak. 295; *Bond v. Central Bank*, 2 Kelly, 92; *St. Joseph Ins. Co. v. Hauck*, 71 Mo. 465; *Van Atta v. State Bank*, 9 Ohio St. 27; *Smith v. First Nat. Bank*, 45 Neb. 444; *Rome Sav. Bank v. Kramer*, 102 N. Y. 331; *Richmond Bank v. Robinson*, 42 Me. 589; and see § 33, *ante*.

¹¹ *Mills v. Rice*, 6 Gray, 458; *Workingmen's Banking Co. v. Rautehberg*, 103 Ill. 460. This last case is wrong. The note was a claim presented to the probate court. The loan, at least, was good, and the bank's claim was not forfeited. The dissenting opinion by Judge Dickey,

which is correct upon the law, contained an interesting *dictum* that the Scriptures are not always good law—a statement that would have been exceedingly shocking to Lord Ellesmere.

¹² § 196 et seq., *post*.

¹³ *St. Louis Nat. Bank v. Flanagan*, 129 Mo. 178.

¹ Real-estate mortgages by national banks are instances. The same result is arrived at by denying the debtor relief. *Elder v. Ottawa First Nat. Bank*, 12 Kan. 238. But the court in this opinion does not see the distinction between a provision which is for the benefit of the bank and a provision in usury laws which is for the protection of the borrower.

The power to take collateral security is one incidental to the banking business.² The nature of what may be taken as collateral has been already discussed.³ But the fact that deposits may be made collateral security for a loan is now settled by competent authority.⁴ A common form of collateral is a guaranty of the loan. Such a guaranty requires not only a consideration to the party primarily liable, but a consideration to the guarantor as well.⁵ Whether the guaranty is a continuing one or not often causes difficult questions to arise.⁶ No species of collateral requires a closer scrutiny upon the part of the banker.⁷ Bills of lading accompanying a draft give the bank a lien upon the property to the amount of its advance,⁸ even though the bill of lading be not indorsed.⁹ This lien has been called the legal title to the goods mentioned in the bill of lading.¹⁰ The duty of the bank collecting the draft has been noticed.¹¹ A bank which holds collaterals may deal with them as it is permitted to do by law,¹² but the fact that the debtor is the president of

² *Comm. Bank v. Nolan*, 7 How. (Miss.) 508.

³ See §§ 113, 114, 115, 116, *ante*.

⁴ *Fisher v. Continental Nat. Bank*, 64 Fed. R. 707, 26 U. S. App. 382. In those states which do not recognize the banker's lien, and some have denied it, the bank can protect itself in this way as to a deposit in its own bank. It is difficult to see how such a lien can be made useful upon a deposit in another bank, without a notice and appropriation of the deposit.

⁵ *Cutter v. Everett*, 33 Me. 201; *Deseret Nat. Bank v. Dinwoodey*, 53 Pac. R. 215. And see 6 Am. & Eng. Encyc. (2d ed.), 692, note 3, 691, note 1. If the guaranty is for a loan contemporaneous with the making of the guaranty and for a future indebtedness, there is a consideration to the guarantor.

⁶ *Agawam Bank v. Steever*, 18

N. Y. 502; *Deseret Nat. Bank v. Dinwoodey*, 53 Pac. R. 215.

⁷ It should be specifically drawn to cover past advances and obligations (see *Deseret Nat. Bank v. Dinwoodey*, 53 Pac. R. 215), and must show a consideration.

⁸ *Commercial Bank v. Pfeiffer*, 108 N. Y. 242; *In re Watch Co.*, 89 Hun, 196. This lien it may assert against an attaching creditor, though it have the right to charge the draft back to the holder. *Am. T. & S. Bank v. Austin*, 55 N. Y. Supp. 561.

⁹ *Moss v. Chicago, etc. Ry. Co.*, 73 Iowa, 226. See Addendum.

¹⁰ *In re Watch Co.*, 89 Hun, 196.

¹¹ See §§ 176, 177, *ante*.

¹² The general rules as to collateral securities or pledges govern banks. They are not considered germane to this work.

the bank gives no implied power of sale without notice to the bank.¹³ The bank is liable as bailee for ordinary care in the custody of the collaterals,¹⁴ and the giving of a receipt for the return of the collateral upon payment of the loan does not vary the relation of the parties.¹⁵ If collaterals are lost by the bank, the giving of a new note for the whole amount, without any claim for deduction on account of the collaterals, known to the debtor to be lost, has been held to be a waiver of any claim therefor.¹⁶

§ 193. Bank's general lien upon collaterals.—A bank has a general lien upon all collaterals deposited with it, unless they are taken under an express agreement;¹ yet the deposit for a special purpose or upon a particular loan rebuts any claim for a general lien.² And where a bank refuses to discount a note sent to it for that purpose, it cannot hold the note as security for an overdraft.³ Where a deed is deposited as collateral security for a certain debt, an equitable lien for another debt, even in those states or jurisdictions which recognize such a lien, will not be created, unless that other debt was created or the money loaned upon the credit of the deed.⁴

§ 194. Charging of interest.—In the absence of other statutory provisions, banks are governed by the laws as to

¹³ Appeal of Conyngham, 57 Pa. 474.

¹⁴ Fleming v. Northampton Bank, Fed. Cas. No. 4862a; Ouderkerk v. Central Nat. Bank, 119 N. Y. 263; As to evidence of want of care, see Erie Bank v. Smith, 3 Brewst. 9.

¹⁵ Jenkins v. Nat. Village Bank, 58 Me. 275.

¹⁶ Girard Bank v. Richards, 4 Phila. 250.

¹ Bank of Metropolis v. New England Bank, 1 How. 234; Kelly v. Phelan, 5 Dill. 228; Baltimore, etc. Ry. Co. v. Wheeler, 18 Md. 372; Wood v. Boylston Bank, 129 Mass.

358; Miller v. Farmers' Bank, 30 Md. 392.

² Armstrong v. Chemical Nat. Bank, 41 Fed. R. 234; Masonic Sav. Bank v. Bangs, 84 Ky. 135; Teutonia Nat. Bank v. Loeb, 27 La. Ann. 110; Neponset Bank v. Leland, 5 Met. 259; Duncan v. Brennan, 83 N. Y. 487. A bank may assert both a general lien and one by special contract. Cockrell v. Joyce, 62 Ark. 216.

³ Bank of Montreal v. White, 154 U. S. 660.

⁴ Biebinger v. Continental Bank, 99 U. S. 143.

the charging of interest which are applicable to individuals.¹ But a different rate may be fixed by the charter of the bank,² and banks may be granted, by special charter, the right to take more than the legal rate of interest, and such legislation would not be special.³ Yet where the charter permits a rate as agreed upon, it is not permissible for the bank to charge more than the legal rate.⁴ Where the charter prohibits the charging of more than a certain rate, the reservation of a greater rate is unlawful.⁵ But the passing of a general law upon the subject of interest does not repeal the rate fixed for the bank by the charter under which it is organized.⁶ A repeal of a higher rate necessarily applies only to contracts thereafter made.⁷

§ 195. What law governs.—The law which governs the performance of the contract determines the lawfulness of the rate.¹ Thus, a note made payable in Illinois, though signed in Tennessee, is an Illinois contract where it was to be used in Illinois.² The rule is carried so far in some cases that where the charter of the bank forbids the charging of more than a certain rate of interest, yet upon a loan made in another state allowing a higher rate the bank may charge it.³ It would follow that a rate of interest lawful where

¹ *Bank of Alexandria v. Mandeville*, 1 Cranch, C. C. 552; *Durkie v. City Bank*, 13 Wis. 216; *Billingsley v. State Bank*, 3 Md. 375; *Lumbermen's Bank v. Bearce*, 41 Me. 505; *Ritenour v. Harrison*, 57 Mo. 502, and the next case thereto.

² *Rock River Bank v. Sherwood*, 10 Wis. 230; *Grand Gulf Bank v. Archer*, 8 Smedes & M. 151; *Stribbling v. Bank of Valley*, 5 Rand. 132.

³ *Hazen v. Union Bank*, 1 Sneed, 115. This case is of doubtful authority.

⁴ *Tishimongo Sav. Inst. v. Buchanan*, 60 Miss. 496; *Simonton v. Lanier*, 71 N. C. 498.

⁵ *Bank of United States v. Owens*, 2 Pet. 527; *Webster v. State Bank*, 4 Ark. 423.

⁶ *Bank of Louisiana v. Stansbury*, 8 La. 257; *Ex. & Bkg. Co. v. Boyce*, 3 Rob. (La.) 307.

⁷ *Pearce v. Bank of Mobile*, 33 Ala. 693.

¹ *Buchanan v. Drivers' Bank*, 55 Fed. R. 223, 6 U. S. App. 566.

² See last case cited.

³ *Hitchcock v. United States Bank*, 7 Ala. 386; *Knox v. Bank of U. S.*, 26 Miss. 655; *Frazier v. Wilcox*, 4 Rob. (La.) 517.

the contract was to be performed was lawful everywhere, but some states refuse to enforce contracts that are usurious under their own laws, although such contracts might be lawful where made.⁴

§ 196. What constitutes usury.—Sometimes the statutes against usury apply only to discounts of the bank¹ and sometimes the statute applies to loans of money.² In either case, however the transaction is disguised, if it amounts to a loan or a discount and an intentional reservation of a greater rate of interest than is allowed by law, the transaction is usurious. Thus the discounting of a note at the bank, and the reception of depreciated post-notes therefor, is usury where the bank obtains more than the lawful rate of interest.³ So is the taking of a note payable in gold for depreciated bank-notes.⁴ But in either case the intention to charge the greater rate must be an ingredient of the transaction.⁵ Where a bank lends its own bills upon a note, together with bills of other banks slightly depreciated, and deducts the

⁴Ewing v. Toledo Sav. Bank, 43 Ohio St. 31; Farmers' Bank v. Burchard, 33 Vt. 346. See as to the principle involved, § 29, *ante*. The foregoing cases are exceptional. In Illinois there is a peculiar statute (2 Starr & Curtis, ch. 74, sec. 8), which provides that upon any written contract, wherever payable, if made in the state, or between citizens or corporations of the state, or a citizen or a corporation of the state and a citizen or corporation of any other state, territory or country, any rate above seven per cent. shall be usurious. This is an attempt to project the laws of the state over other states as to foreign contracts. Other states would refuse to follow it. It could not affect national banks. It has been ignored in Morris v. Wibaux, 159

Ill. 627, 47 Ill. App. 630; Giddings v. McCumber, 51 Ill. App. 373, *semble*; Roundtree v. Baker, 52 Ill. 241. It seems never to have been applied, though on the statute book since 1857. The statute is noticed without comment in Fowler v. Equitable Trust Co., 141 U. S. 384.

¹See Planters' Bank v. Goetter, 108 Ala. 408.

²Farmers' Bank v. Burchard, 33 Vt. 346. The national bank act applies to discounts, loans and purchases. See sections 5197 and 5198 of the Revised Statutes of the United States.

³Gaithier v. Farmers' Bank, 1 Pet. 44.

⁴Bank v. Owens, 2 Pet. 527.

⁵Bank of U. S. v. Waggener, 9 Pet. 378, which explains the preceding cases.

legal rate, upon the agreement that, if any of the bills are returned during the continuance of the loan, such bills were to be paid in specie, the contract was held not to be usurious.⁶ Since a bank is bound to redeem its own bills, the lending of them at their face value, though depreciated, is not usurious, although the legal rate of interest is charged.⁷ But the opposite rule would apply to bills of other banks.⁸ The retention of a commission by the agent of the borrower under some circumstances may be usurious.⁹ Under statutes which forbid usurious discounts, a note in payment of a pre-existing debt is not a discount;¹⁰ nor, it seems, is a transaction where a note is taken for both the principal and interest.¹¹ But contracts whereby banks tried to keep their notes in circulation have been held to be discounts,¹² as also have purchases of bank-bills payable at a distant place,¹³ and promissory notes,¹⁴ where purchased at a discount. The charging of interest at the highest legal rate by bank discount has been held to be usurious, upon notes running for a longer period than a year, as, for instance, by deducting from a note the interest for one year multiplied by the number of years the note has to run;¹⁵ but the charging of in-

⁶ *Northampton Bank v. Allen*, 10 Mass. 284. To the same effect is *Bank of Orleans v. Curtis*, 11 Met. 359. Compare *Bank of Chenango v. Curtis*, 19 Johns. 326; *Farmers' Bank v. Burchard*, 33 Vt. 346.

⁷ *Maury v. Ingraham*, 28 Miss. 171; *State Bank v. Ford*, 5 Ired. 692. These were notes payable on demand, not post notes.

⁸ See last two cases cited. But if the tacit understanding was to return for the loan like depreciated notes, a different rule would apply. *Curtis v. Leavitt*, 17 Barb. 309.

⁹ *Olmstead v. New England Mort. Co.*, 11 Neb. 487. Compare *Union Nat. Bank v. Louisville, etc. R. Co.*, 145 Ill. 208. See *Clark on Contracts*, 403.

¹⁰ *Lime Rock Bank v. Hewett*, 52 Me. 531. It is not a usury case.

¹¹ *Planters' Bank v. Goetter*, 108 Ala. 408. But if the note is actually for usurious interest and considered payment thereof, it is difficult to see how this case can be correctly decided. See note 19 to § 198, *post*.

¹² Compare last two cases cited in note 6 to this section.

¹³ *People v. Metropolitan Bank*, 7 How. Pr. 144.

¹⁴ *Atlantic State Bank v. Savery*, 82 N. Y. 291.

¹⁵ *Branch Bank v. Strothers*, 15 Ala. 51. See next note as to the proper rule.

terest by bank discount is not usually considered to be usurious.¹⁶ The discounting of a note to pay a note which is not yet due, but has been previously discounted, is not usurious.¹⁷ A charge made for exchange in addition to the legal rate is not usurious¹⁸ unless it be a mere device to avoid the statute.¹⁹ The charging of a higher rate of interest after maturity is not usurious,²⁰ nor is the insertion of certain penalties for non-payment of the note,²¹ such as attorney's fees for collection by suit.²² National banks are permitted to charge the rate fixed by the laws of the state for natural persons²³ unless a higher rate is allowed to banks of issue, in which case they may charge the latter rate.²⁴ Where no rate is fixed by the laws of the state, national banks may charge seven per centum.²⁵ Where the laws of the state permit any rate to be fixed by agreement, it is doubtful whether a national bank may charge more than seven per centum, unless state banks of issue in the particu-

¹⁶ Clark on Contracts, 402. Bank discount, that is to say, payment of interest in advance, is not usury. *Fowler v. Trust Co.*, 141 U. S. 384. But it undoubtedly is, as a matter of fact, paying interest upon interest. See *Bank of Alexandria v. Mandeville*, 1 Cranch, C. C. 552; *Maine Bank v. Butts*, 9 Mass. 49.

¹⁷ *Maine Bank v. Butts*, 9 Mass. 49. See *Carolina Bank v. Parrot*, 30 S. C. 61. But charging interest on overdrafts, while crediting drafts as cash, is not usurious. *Timberlake v. First Nat. Bank*, 43 Fed. R. 231.

¹⁸ *Planters' Bank v. Bivingsville Cotton Co.*, 11 Rich. Law, 677; *Merchants' Bank v. Sassie*, 33 Mo. 350; *Farmers' Bank v. Garten*, 34 Mo. 119; *Marvine v. Hymers*, 12 N. Y. 223; *Southern Bank v. Brashears*, 1 Disn. 207. National banks are permitted by statute to make such a charge.

¹⁹ *Central Bank v. St. John*, 17 Wis. 157. But compare *Farmers' Bank v. Parker*, 37 N. Y. 148, and *International Bank v. Bradley*, 19 N. Y. 245, where the transaction was no more than an evasion, but was held not usurious.

²⁰ *Chambliss v. Robertson*, 23 Miss. 302.

²¹ Clark on Contracts, 401. But see a curious decision holding a stipulation for attorneys' fees void. *Merchants' Nat. Bank v. Sevier*, 14 Fed. R. 662.

²² They are universally allowed. Whether they destroy the negotiability of a note is a much-discussed question, both under statutes and at common law.

²³ See Rev. Stat., secs. 5197, 5198.

²⁴ See last section.

²⁵ See last note.

lar state are permitted to charge such a rate.²⁶ This statute applies to discounts or purchases of commercial paper at the bank as well as to loans;²⁷ but whether or not a note is void for usury in the hands of a *bona fide* holder where the note itself stipulates for legal interest must depend upon the statute.²⁸ Under state statutes a discount of commercial paper is sometimes usurious and sometimes it is not.²⁹ But a bank does not make itself liable for collecting usurious interest where it acted simply as agent, although it transferred the note.³⁰ A bank may charge a certain rate for lending its credit by indorsement, where it does not discount the note, without making itself liable for a usurious transaction. Renewal notes are held to be within the statutes of usury.³¹ If the last note contained usurious interest, and each renewal also contained it, each note will be held to be usurious, and only the original principal can be recovered.³²

²⁶ If state banks of issue are permitted to charge any agreed rate, a national bank may charge it. *First Nat. Bank v. Duncan*, Fed. Cas. No. 4804; *Tiffany v. State Bank*, 18 Wall. 409. But where the law permits to private persons any rate, and there are no banks of issue, as there are not in some states, it would seem to follow that, no rate being fixed, the statute as to seven per cent. governs. So *National Bank v. Johnson*, 104 U. S. 271, expressly states, and says of *Tiffany v. State Bank*, *supra*: "It is not intimated or implied" that that case establishes any other rule. And so is *Crocker v. First Nat. Bank*, 4 Dill. 358. But *contra* are *Hines v. Marmolejo*, 60 Cal. 229, a state where banks of issue are prohibited by the constitution; *Wolverton v. Exch. Nat. Bank*, 11 Wash. 94; *Guild v. First Nat. Bank*, 4 S. D. 566; *National Bank v. Bruher*,

64 Tex. 571; *Rockwell v. Farmers' Bank*, 4 Colo. App. 562; *California Bank v. Ginty*, 108 Cal. 148. The difficulty is that the statute is wrongly worded, and these courts are doing some amending to make the law read correctly.

²⁷ *National Bank v. Johnson*, 104 U. S. 271; *Johnson v. National Bank*, 74 N. Y. 329; *Danforth v. Nat. State Bank*, 48 Fed. R. 271, *semble*.

²⁸ *Second Nat. Bank v. Morgan*, 165 Pa. 199.

²⁹ *Dunkle v. Renick*, 6 Ohio St. 527. Compare *Nash v. White's Bank*, 68 N. Y. 396; *Atlantic State Bank v. Savery*, 82 N. Y. 291.

³⁰ *First Nat. Bank v. Miltonberger*, 33 Neb. 847.

³¹ *Winterset Nat. Bank v. Eyre*, 52 Iowa, 114; *Farmers' Bank v. Hoagland*, 7 Fed. R. 159; *Snyder v. Mt. Sterling Bank*, 94 Ky. 231.

³² *Peoples v. First Nat. Bank*, 15 Ky. Law R. 748. See also *Moniteau*

§ 197. **Effect of usury.**—The transaction which is usurious is necessarily an illegal agreement. If the illegal agreement has been consummated and the parties are *in pari delicto*, no recovery of the usurious interest paid would be permitted at common law. But most courts have held that the statute being for the protection of the borrower, he is not *in pari delicto* with the lender. The same result follows where a penalty is imposed upon the lender. Other statutes give the right to recover the illegal interest paid, and such is the case with the national bank act. In some states the loan is declared void,¹ in others the interest is forfeited,² in others the excess of interest over the legal rate is forfeited.³ The subject is one which cannot properly be considered as belonging to a treatise of this nature.⁴

§ 198. **Effect of usury under the national bank act.**—The national bank act is exclusive in its terms. It declares the whole interest void¹ if it be not paid, and it allows a recovery of twice the excess or the whole interest² paid where

Nat. Bank v. Miller, 73 Mo. 187; Cake v. Lebanon Nat. Bank, 86 Pa. 303.

¹ Mills v. Rice, 6 Gray, 458; Bank of U. S. v. Owens, 2 Pet. 527, applies such a ruling to a case where there was no statute, but on that point the case is not sound.

² Grand Gulf Bank v. Archer, 8 Smedes & M. 151; Hawley v. Kountze, 38 N. Y. Supp. 327.

³ Chafin v. Lincoln Sav. Bank, 7 Heisk. 499; Darby v. Boatmen's Sav. Inst., 1 Dill. 141; Veazie Bank v. Paulk, 40 Me. 109; Lumbermen's Bank v. Bearce, 41 Me. 505.

⁴ The effect of these statutes upon the contract is to forfeit the debt (Mills v. Rice, 6 Gray, 458); to forfeit the debt only as between borrower and lender, but not to annul the contract (Farmers' Bank v. Parker, 37 N. Y. 148); to render the

note or bill void (Orr v. Lacey, 2 Doug. 230; Brower v. Haight, 18 Wis. 102); but to leave the loan good (Rock River Bank v. Sherwood, 10 Wis. 230; Van Atta v. State Bank, 8 Ohio St. 27). See § 201, *post*.

¹ See note 5, *post*.

² The rule differs. Johnson v. National Bank, 74 N. Y. 329; affirmed in National Bank v. Johnson, 104 U. S. 271, without the point being raised, and other New York cases and Bobo v. People's Nat. Bank, 92 Tenn. 444, say the recovery is twice the excess. But Wiley v. Starbuck, 44 Ind. 298; Crocker v. First Nat. Bank, 4 Dill. 358; Markham v. First Nat. Bank, Fed. Cas. No. 9097; National Bank v. Johnson, 91 Ky. 181; Lucas v. Government Nat. Bank, 78 Pa. 228, say twice the whole interest.

the transaction is complete. This statute governs national banks to the exclusion of state legislation,³ and state penalties for usury do not apply.⁴ Where the interest has not been paid, the interest is simply declared void and the bank can recover only the principal of the note.⁵ The statute applies to overdrafts as well as other loans,⁶ but the note itself is not rendered void⁷ nor the deposit of collateral security.⁸ The title to the note is not affected,⁹ nor its negotiability destroyed, by a usurious discount.¹⁰ A state statute cannot forfeit the debt,¹¹ but a state statute may make the act of the officers of a national bank in taking usury an offense against the state.¹² The two years' limitation in the statute applies to the suit to recover, but does not apply to the forfeiture of the usurious interest reserved,¹³ and the forfeiture may be set up at any time in defense of the note.¹⁴ The action provided for the recovery of usurious interest paid

³ *Farmers' Bank v. Dearing*, 91 U. S. 29.

⁴ *First Nat. Bank v. Lamb*, 57 Barb. 429 (wrongly reversed); *Central Nat. Bank v. Pratt*, 115 Mass. 539; *Imp. & Trad. Bank v. Littell*, 46 N. J. Law, 506.

⁵ *Farmers' Nat. Bank v. Dearing*, 91 U. S. 29; *Peterborough Nat. Bank v. Childs*, 130 Mass. 519. If part is paid, the rest is forfeited. It forfeits the interest which would have accrued after maturity (*First Nat. Bank v. Stauffer*, 1 Fed. R. 187; *Shunk v. First Nat. Bank*, 22 Ohio St. 508), even though lawful. *Shafer v. First Nat. Bank*, 53 Kan. 614; *Nat. State Bank v. Brainard*, 61 Hun, 339.

⁶ *Third Nat. Bank v. Miller*, 90 Pa. 241.

⁷ *Nat. Ex. Bank v. Moore*, 2 Bond, 170; *Wiley v. Starbuck*, 44 Ind. 298.

⁸ *Oates v. Montgomery Nat. Bank*,

100 U. S. 239; *Allen v. First Nat. Bank*, 23 Ohio St. 97.

⁹ *Newell v. First Nat. Bank*, 13 Ky. Law R. 775; *First Nat. Bank v. Garlinghouse*, 22 Ohio St. 492; *Hintermister v. First Nat. Bank*, 64 N. Y. 212.

¹⁰ *Nicholson v. National Bank*, 92 Ky. 251.

¹¹ *Farmers' Bank v. Dearing*, 91 U. S. 29.

¹² *State v. First Nat. Bank*, 2 S. D. 568.

¹³ *Peterborough Nat. Bank v. Childs*, 130 Mass. 519; *Moniteau Nat. Bank v. Miller*, 73 Mo. 187; *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346.

¹⁴ See cases in last note, and see, further, *Exeter Nat. Bank v. Orchard*, 39 Neb. 485, holding that the making of a new note to the bank, where the original note was to another person, does not cut off the defense.

permits a recovery of twice the excess over the legal rate,¹⁵ or twice the whole interest paid.¹⁶ This remedy is exclusive and cannot be supplemented.¹⁷ The action is penal in its nature, and the double amount of the interest forfeited cannot be claimed by way of set-off or counter-claim.¹⁸ The two years' limitation begins to run either from the date of the payment of the usurious interest,¹⁹ or from the date of the transaction according to some insufficient authority.²⁰ The bank cannot set off against the penalty sought to be recovered any claim of its own.²¹ Payments made are to be considered as paid on the face of the debt, not upon the interest.²²

§ 199. Who may set up usury.—Generally speaking only the parties to a usurious transaction are affected by it. It is not a defense for the drawer of a bill of exchange against

¹⁵ See note 2, *ante*.

¹⁶ See note 2, *ante*. But the penalty does not draw interest (Higley v. First Nat. Bank, 26 Ohio St. 75) until judgment.

¹⁷ *Barnet v. National Bank*, 98 U.S. 555; *Wiley v. Starbuck*, 44 Ind. 298; *Oldham v. First Nat. Bank*, 85 N. C. 240; *First Nat. Bank v. Gruber*, 91 Pa. 377; *Hill v. National Bank*, 56 Vt. 582.

¹⁸ *Driesbach v. Wilkesbarre Bank*, 104 U.S. 52; *Danforth v. Nat. State Bank*, 48 Fed. R. 271, 3 U.S. App. 7; *Farmers' Nat. Bank v. Stover*, 60 Cal. 387; *Stephens v. Monongahela Bank*, 111 U.S. 197, and numerous other cases. One case says the maker of the note may plead to a suit brought upon a collateral mortgage the satisfaction of the debt by the payment of usurious interest on renewals before debt came into the possession of the bank. *Exeter Nat. Bank v. Orchard*, 39 Neb. 485.

¹⁹ *National Bank v. Davis*, 8 Biss. 100; *Kinser v. Farmers' Nat. Bank*, 58 Iowa, 728; *Lynch v. Merchants' Nat. Bank*, 22 W. Va. 554; *Carpenter v. National Bank*, 50 N. J. Law, 6; *First Nat. Bank v. Smith*, 36 Neb. 199. Or judgment. *Duncan v. First Nat. Bank*, Fed. Cas. No. 4135. Giving a note seems to be payment. *Lebanon Nat. Bank v. Karmany*, 98 Pa. 65; but see *Cadiz Bank v. Slemmons*, 34 Ohio St. 142. See note 11 to § 196, *ante*.

²⁰ *Henderson Nat. Bank v. Alves*, 91 Ky. 142.

²¹ *Morehouse v. National Bank*, 30 Hun, 628; *Lebanon Nat. Bank v. Karmany*, 98 Pa. 65.

²² *Danforth v. Nat. State Bank*, 48 Fed. R. 271, 3 U. S. App. 7; *Cadiz Bank v. Slemmons*, 34 Ohio St. 142. But where renewal notes are given after crediting payments, see *Kinser v. Farmers' Bank*, 58 Iowa, 728.

the bank;¹ but under the national banking law the reservation of usurious interest destroys the interest-bearing quality of the instrument, and hence the acceptor of drafts purchased without an indorsement to it by a bank at usurious rates may defend against interest upon the drafts.² A corporation forbidden by a state statute to set up the defense of usury may nevertheless claim the defense under the national banking law.³ A director of a bank may set it up against the bank on a loan to himself.⁴ But a renewal note which was given for an accommodation note which had an indorser, who indorsed the accommodation note to the bank at a usurious rate, is not subject to the defense of usury in favor of an indorser upon the renewal note.⁵ Parties who may sue are noticed in the next section.

§ 200. Matters of pleading and procedure.—The charge of usury must always be that the act was done knowingly,¹ but a corrupt intent need not be averred in the answer if facts equivalent thereto are pleaded.² The person to set up the usury must be one covered by the statute. Under the statute giving the right to legal representatives, the executor or administrator of a decedent and the receiver of a corporation³ would be entitled, as well as, perhaps, an indorsee of a bill of exchange,⁴ an assignee for creditors,⁵ but not a

¹ Oneida Bank v. Ontario Bank, 21 N. Y. 490.

² Danforth v. Nat. State Bank, 48 Fed. R. 271, 3 U. S. App. 7. This rule would apply to any person not a *bona fide* holder.

³ Union Nat. Bank v. Louisville R. Co., 145 Ill. 208; In re Weed, 11 Blatch. 243.

⁴ Cadiz Bank v. Slemmons, 34 Ohio St. 142.

⁵ Bly v. Second Nat. Bank, 79 Pa. 453.

¹ Schuyler Nat. Bank v. Bollong, 24 Neb. 821. For sufficiency of pleading, see Guild v. First Nat.

Bank, 4 S. Dak. 566; Morgan v. First Nat. Bank, 93 N. C. 352.

² National Bank v. Orcutt, 48 Barb. 256.

³ Barbons v. Nat. Ex. Bank, 45 Ohio St. 133.

⁴ Barnett v. National Bank, Fed. Cas. No. 1026, is wrong. The correct rule was stated in National Bank v. Lewis, 75 N. Y. 516, 81 N. Y. 15, and Cake v. First Nat. Bank, 86 Pa. 303.

⁵ Osborn v. First Nat. Bank, 175 Pa. 494. This case is opposed to the weight of authority, which gives the rule stated in the text. Wright

judgment creditor.⁶ One joint maker cannot recover the usurious interest where it was paid by the other joint maker;⁷ but if the plaintiff be the actual and beneficial owner, the fact that the joint maker is suing will not affect the recovery.⁸ Suits either to recover usurious interest paid, or where the reservation of usurious interest is set up as a defense, must be entertained by the state courts,⁹ as well as by the courts of the United States, if they have jurisdiction; but in order to obtain a review in the Supreme Court of the United States of a case in the state courts, the right of the national bank under the statute to charge a certain rate of interest must be specially set up or claimed in the state courts.¹⁰

§ 201. Rights and liabilities of bank in discounting.—

If a bank discounts a note, where the discounting was induced by fraud, it may rescind it;¹ and even where no fraud appeared it was held that a discount could be revoked, though unpresented checks had been drawn against the proceeds.² The charging up of a note as paid and the delivery

v. First Nat. Bank, Fed. Cas. No. 18,078; Crocker v. First Nat. Bank, Fed. Cas. No. 3397. A statutory penalty creates a *quasi-contract* which is assignable.

⁶ Barrett v. Shelbyville Nat. Bank, 85 Tenn. 426.

⁷ Timberlake v. First Nat. Bank, 43 Fed. R. 231.

⁸ First Nat. Bank v. Gruber, 91 Pa. 377.

⁹ See § 244, *post*, for the statutes applicable to suits to recover penalties. This is not a new jurisdiction, but their ordinary jurisdiction. But the remedy is not a state remedy. Norfolk Nat. Bank v. Schwenk, 46 Neb. 381. But it is governed as to form of procedure by the local law. Osborn v. First Nat. Bank, 175 Pa. 494. State courts have jurisdiction also of usury as a

defense. Peterborough Nat. Bank v. Childs, 130 Mass. 519. See also section 245 for the particular state or federal court which has jurisdiction. Compare Mo. Tel. Co. v. First Nat. Bank, 74 Ill. 217, for a very queer states rights decision. See § 244, *post*. This last case holds the remarkable doctrine that a state court will not enforce the usury laws of the United States, because congress has not power to give the state courts such a jurisdiction. This is a queer freak, and of course is not the law, even in Illinois. See Ellis v. First Nat. Bank, 11 Ill. App. 275, ignoring it.

¹⁰ Schuyler Nat. Bank v. Bollong, 150 U. S. 85.

¹ Bank of Antigo v. Union Trust Co., 50 Ill. App. 434.

² Dougherty v. Central Bank, 93

of the note by mistake do not operate as payment either as to the maker or as to the sureties.³ A person discounting paper at the bank warrants the genuineness of the signatures of the maker and the indorsers;⁴ and where the president of a bank discounted with another bank forged paper of his bank, depositing as security therewith, but without authority, certain bonds of his bank, the bank granting the discount may hold the bonds as security against the first bank.⁵ Where the maker of a note which has two indorsements thereon, the first forged and the second genuine, discounts the note to a bank, the bank may hold the second indorser.⁶ But the bank must ascertain, where a partner attempts to discount for his private business a note indorsed by the firm, whether the note was so indorsed by special authority from the firm.⁷ The bank may sue in the payee's name for its benefit upon a transfer to itself by a forged indorsement of the payee's name, where the forgery was committed by one of the makers who made the transfer to the bank.⁸ The bank does not warrant to the acceptor of a draft discounted by it the genuineness of a bill of lading attached to the draft,⁹ and if the consignee pays drafts discounted by the bank in ignorance of the fact that the bills of lading attached to the draft were forged, he cannot recover from the bank.¹⁰ Banks under one statutory system were forbidden to assign their loans, and the objection was held to be pleadable only in abatement.¹¹ The general rule as to loans made in contra-

Pa. 227. See also *Lancaster Co. Bank v. Huver*, 114 Pa. 216, where there was a failure of consideration or fraud.

³ *Dewey v. Bowers*, 4 Ired. 538; *Bank v. Rolston*, 3 Phila. 328.

⁴ *Cabot Bank v. Morton*, 4 Gray, 156.

⁵ *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. Law, 513. This was simply a case of an agent acting within the apparent scope of his authority.

⁶ *State Bank v. Fearing*, 16 Pick.

533. This case is simply one of the indorser's contract. But state courts differ as to the meaning of an irregular indorsement.

⁷ *Lemoine v. Bank of North America*, 3 Dill. 44.

⁸ *York Bank v. Asbury*, 1 Biss. 230.

⁹ *Goetz v. Bank of Kansas City*, 119 U. S. 551.

¹⁰ *Hoffman v. Bank of Milwaukee*, 12 Wall. 181.

¹¹ *Planters' Bank v. Sharp*, 4 Smedes & M. 17; *Lañier v. Tripp*, 6 Smedes & M. 641; *Commercial*

vention of law has been already stated.¹² One case held that, where a note was made payable out of the state, the defense of unlawful banking by the issuance for the loan of illegal bank-notes by private persons was good.¹³ But the loaning contract is not void unless declared so by law. The note may be sued on¹⁴ or an action may be brought for money loaned,¹⁵ and where the contract is declared void some cases hold that no action at all lies.¹⁶ But it would seem that the breach of duty by an officer in taking the note cannot be set up against the note by one liable upon it.¹⁷ It was also held that a debtor could not set up the unconstitutionality of the act incorporating the bank.¹⁸

§ 202. **Payment of loans.**—Where all kinds of money are equally good, the payment of a loan from a bank is a simple matter if the debtor can control any kind of money. Whether the bank-notes of national banks, or treasury notes or silver notes or gold notes are used, no question can arise as to their value. The legal tender moneys are always, of course, a good tender, unless the loan is payable in gold or coin. But if those moneys vary in value, all sorts of difficulties are likely to arise. At the present time this parity is maintained by the fact that silver coin can be readily changed into legal tender notes. The government's faith is pledged to pay the notes in coin, just as the treasury notes for silver purchases are payable in coin. The government chooses, in order to maintain the parity, to pay in gold, or is ready to pay in gold, which keeps all the token money on a

Bank v. Thompson, 7 Smedes & M. 443. If the assignment was illegal it would confer no title. These cases are as anomalous as the banking system.

¹² See §§ 32 and 33, *ante*.

¹³ Hamtramck v. Selden, 12 Grat. 28.

¹⁴ See §§ 33, 191, *ante*, and note 4 to § 197, *ante*.

¹⁵ See last note.

¹⁶ It is thought that the usury

statutes of some states are the only instances of such a proceeding.

¹⁷ Bruce v. Hawley, 31 Vt. 643. One not a party to an illegal transaction has no right to set up the fact of illegality.

¹⁸ Snyder v. State Bank, 1 Ill. 161. But see for the true rule, § 30, *ante*. The court overlooked the fact that a *de facto* corporation can exist only where a *de jure* organization would be possible.

parity with gold. So that it is really immaterial, under the present condition, whether a loan is payable in gold or not. But the least change in the policy of the government would at once precipitate upon us the evils of a currency where every kind of money except gold coin and gold notes would be at an enormous discount. Even the national-bank notes would join in the crash, because the bonds which secure them are payable in coin. The situation of the circulating medium in the halcyon days of "wild cat" and "red dog" currency, and in the palmy days of the state banks of issue, finds expression in the decisions of that period. We have already noticed some curious instances of the payment of deposits¹ and discounts.² Owing to the peculiar nature of some state banks it was possible for a debtor to the bank to pay his debt, in one instance at least, in state bonds or in the interest due thereon.³ The debtor, however, could not pay his debt by setting off the stock of the bank.⁴ The debtor could not pay in uncurrent bank-bills, nor would the bank-bills of any other bank but the one suing or owning the debt be a discharge of or set-off against the note.⁵ In case the debtor attempted to pay, or, what amounts to the same thing, attempted to set off the bills of the bank holding the loan or the debt, the curious result was as follows: If he tendered the bills of the bank the tender was not good and would not stop the running of interest.⁶ If he attempted to set off the bills of the bank suing him, his right

¹ Note 2 to § 17, *ante*, and *Fort v. son Co. Bank v. Chapman*, 19 Johns. Bank of Cape Fear, 61 N. C. 417; 322.
Bank of Kentucky v. Wister, 2 Pet. 318; *Gumbel v. Abrams*, 20 La. Ann. 568. For collections, see note 1 to § 176, *ante*.

² Notes 6-8 to § 196, *ante*; the last two cases in note 6 to § 196, *ante*.

³ *Fagan v. Stillwell*, 19 Ark. 282.

⁴ *Harper v. Calhoun*, 7 How. (Miss.) 203.

⁵ *Moise v. Chapman*, 24 Ga. 249. The cases in this section all recognize this principle. See also *Jeffer-*

Hallowell Bank v. Howard, 13 Mass. 235; *Hevener v. Kerr*, 4 N. J. Law, 58. Compare *Northampton Bank v. Balliet*, 8 Watts & S. 311. But the general rule is that bank-notes are so far money that a tender of bank-notes must be expressly objected to on that ground. *Phillips v. Blake*, 1 Met. 156; *Thomas v. Todd*, 6 Hill, 340, seem to suggest the rule.

depended upon the fact whether he owned the bills at the time the suit was commenced or acquired them afterwards. In the former case he could set them off;⁷ in the latter case he could not.⁸ But statutes compelled the bank to take its own bills in payment of its claims.⁹ In such case the bank could get rid of this liability by assigning the debt, in which event the bank's bills were not a good set-off if the assignment was *bona fide*,¹⁰ unless, in Pennsylvania, the debtor held them at the time of the assignment, if he was informed of it.¹¹ Since a "stock note" might be either a note given for a subscription to stock or a note given for stock purchased from the bank, where nothing more appeared than that the judgment was for a stock note, the bank-bills were a good payment.¹² It was held also before a statute compelling the bank to take its own bills was passed, that the bank was not compelled to do so where it had discounted the note in good money, not depreciated paper.¹³ When the bank became insolvent, further complications were introduced which will be considered under a later section.¹⁴ To the present generation, who have had little experience in depreciated currency, and none in currency composed of bills of numberless banks of doubtful or no value, it is almost impossible to conceive of business being transacted under such conditions.¹⁵

⁷ Kelly v. Garrett, 6 Ill. 649. Unless a statute provided otherwise. Bank of Pennsylvania v. Spangler, 32 Pa. 474.

⁸ See cases in last note.

⁹ Abbott v. Agricultural Bank, 11 Smedes & M. 405; Niagara Bank v. Roosevelt, 9 Cow. 409. The method in one state was obtaining a rule to show cause why bank should not take its own notes. Mann v. Blount, 65 N. C. 99.

¹⁰ McDougal v. Holmes, 1 Ohio, 176; Treble v. Bank of Grenada, 2 Smedes & M. 523; Farmers' Bank v. Willis, 7 W. Va. 31.

¹¹ Philips v. Bank of Lewiston, 18

Pa. 394; Northampton Bank v. Ballet, 8 Watts & S. 311. See also Bank of Bennington v. Booth, 16 Vt. 360.

¹² Dunlop v. Smith, 12 Ill. 399.

¹³ Commercial Bank v. Atherton, 1 Smedes & M. 641. See Riggs v. Dyche, 2 Smedes & M. 606.

¹⁴ See § 224, *post*.

¹⁵ Although the national-bank notes are not a legal tender, the government takes them for all demands due it except duties, and each national bank must take every other national bank's notes. Thus they are practically legal tender.

CHAPTER X.

EXCHANGES, SECURITIES AND COLLECTIBLE PAPER.

ARTICLE I.—EXCHANGES AND SECURITIES.

§ 203. Power and liabilities as to exchanges and securities.—In a former section¹ we have noticed the general powers of a bank in dealing in negotiable paper and securities. It has the *prima facie* power to purchase bills of exchange² at the place where it is authorized to do business.³ It may buy and sell negotiable bonds,⁴ or make exchanges of government bonds for customers.⁵ It is a legitimate feature of the banking business for one bank to cash checks or drafts upon another bank,⁶ and it may act as agent in making loans of money or of special deposits for customers.⁷ Exchange purchases when made by one bank for another bank have been held to be confined to drafts upon the particular bank which made the purchase.⁸ Letters of credit are nothing more than letters of guaranty made by one bank to another. The rules of law would not vary as between the two engagements. This matter will be discussed under the head of "Acceptance." When the bank is agent to loan moneys it is not liable as debtor,⁹ but is held to good faith¹⁰ and skill as a banker.¹¹

¹ See § 113, *ante*.

² *Bank of Louisville v. Ellery*, 34 Barb. 630.

³ Primarily the banking business must be carried on at its place of business. See *People v. Oakland Bank*, 1 Doug. 282. And see §§ 24, 103, *ante*.

⁴ *Mt. Vernon Bank v. Porter*, 52 Mo. App. 244. This decision is really upon a statute, but the statute would not add anything.

⁵ *Yerkes v. National Bank*, 69 N. Y. 382.

⁶ *Murray v. Bull's Head Bank*, 3 Daly, 364.

⁷ *Isham v. Post*, 141 N. Y. 100; *Wykoff v. Irvine*, 6 Minn. 496.

⁸ *Reynes v. Dumont*, 130 U. S. 354.

⁹ *Wykoff v. Irvine*, 6 Minn. 496.

¹⁰ See last case cited.

¹¹ *Isham v. Post*, 141 N. Y. 100.

§ 204. **Forged paper.**—In a former section referring to deposits¹ was stated the rule as to the payment of forged paper that obtains between banks. The payment of exchanges is practically governed by these rules. If the acceptance be forged and the bank pays it, the party whose name is forged can of course hold the bank, if he gives notice when he discovers the forgery;² and if the drawer returns the draft to the payee, who presents it and is refused payment, the drawer can thereupon sue the bank.³ But the indorsement of a fictitious payee's name, the fictitious payee being thought to be an existing person, is none the less a forgery.⁴ But it has been held that if the payee who indorses the draft is the person intended, his indorsement is not a forgery and no recovery can be had against the bank by the drawer.⁵ The negligence of the drawer of the draft has usually been held to be a defense against him, where the draft was raised,⁶ and the same rule applies to the acceptor in accepting on a forged signature;⁷ but one court

¹ See § 155, *ante*, and also § 154, *ante*.

² *First Nat. Bank v. Tappan*, 6 Kan. 456. For duty as to examination to detect forgery, see § 154, *ante*.

³ *Citizens' Nat. Bank v. Imp. & Trad. Nat. Bank*, 119 N. Y. 195. The reason of the rule is that payment upon a forged signature is no payment at all. *Star Fire Ins. Co. v. State Nat. Bank*, 60 N. H. 442. As to raised drafts and forged signatures, see § 154, *ante*. If the bank agrees to repay an amount charged on a forged draft it will be held none the less, because it would be held without the agreement. *Nat. Bank of Commerce v. Manufacturers' Bank*, 122 N. Y. 367. If a bank pays a raised draft it may recover.

⁴ *Chesin v. First Nat. Bank*, 96 Tenn. 641; and see § 151, *ante*.

⁵ *Emporia Nat. Bank v. Shotwell*, 35 Kan. 360; *Crippen v. American Nat. Bank*, 51 Mo. App. 508. Both these cases are wrong. They were intended to decide what is stated in the text. But both bank and drawer were deceived, and both made a mistake of fact in thinking that the person who indorsed was another individual intended by them. It was a clear case of mutual mistake. If they had intended the first person by the name of the payee, as the text above indicates, the decisions would have been correct. See note 23, § 154.

⁶ See § 154, *ante*.

⁷ *Howard v. Mississippi Valley Bank*, 28 La. Ann. 727.

became entangled in a metaphysical subtlety and held that where a clerk in a bank drew a draft which could be easily altered, and had it signed by the cashier, whereupon the clerk took the draft from the confiding cashier and altered it and discounted it, the forgery of the check and not the negligence of the cashier was the proximate cause of the loss.⁸ This decision is simply another proof of how prone even able courts are to fall into palpable error. The test is, Could the forgery have been committed if the cashier had not been negligent? If not, then the cashier's negligence was a concurring cause of loss, and the bank was liable. This case would overturn a principle that is absolutely settled as to the drawer of a check, and a bank draft is no more than a check by one bank upon another. The bank could hold the cashier liable to it for his folly, but the innocent holder had no remedy except against the bank. If the bank takes money from a person upon a forged signature, it will be compelled to pay it.⁹ If it pays to a person upon a forged signature or a forged draft it may recover,¹⁰ except where the signature of the drawer was forged and it paid to a *bona fide* holder.¹¹ But the person who obtains the draft from the bank and sends it to the payee, who receives upon it more than the amount for which the draft was drawn, is not liable to the bank, unless he received the money.¹²

⁸ Exchange Nat. Bank v. Bank of Little Rock 58 Fed. R. 140, 19 U. S. App. 152. This case was not one of proximate cause at all. The injury arose from the forgery and the opportunity therefor given by the cashier. The cashier's negligence concurred in affording the opportunity and was taken advantage of by the clerk. The cases cited by the court do not justify the decision.

⁹ Even to one who pays *supra protest*. Goddard v. Merchants' Bank, 2 Sandf. 247.

¹⁰ See § 154, *ante*.

¹¹ National Park Bank v. Ninth Nat. Bank, 46 N. Y. 77. Another bank has been held to be within this rule. Northwestern Nat. Bank v. Bank of Commerce, 107 Mo. 402; but see § 155, *ante*. For the rule under a statute, see Tradesmen's Nat. Bank v. Third Nat. Bank, 66 Pa. 435.

¹² City Nat. Bank v. Stout, 61 Tex. 567. In this case the cashier of the bank assisted in deceiving the bank that paid.

ARTICLE II.—ACCEPTANCE.

§ 205. **Collectible paper.**—In former sections (179 *et seq.*) was discussed the liability of a bank or banker for failure to take proper steps in making a collection intrusted to the bank. It is the purpose of the author now to discuss the rules of law applicable to the presentation of paper for acceptance when the paper requires such presentment, and the necessity for protest and notice of non-acceptance as well as the rules as to demand of payment and protest and notice of non-payment. While this subject is not peculiar to banking law, and belongs within the scope of a general work on bills and notes, yet the subject is of such controlling importance in banking business that no excuse is needed for its insertion here. The acceptance of checks upon the particular bank by certifying them has already been noticed,¹ as well as the acceptance by the bank of paper payable at the bank,² and that discussion will not be repeated. The different kinds of paper in regard to which these questions of acceptance and demand of payment arise may roughly be classed as orders for the payment of money (which do not amount to bills of exchange), checks, promissory notes (which include certificates of deposit, hereinbefore discussed)³ and bills of exchange. An examination will first be made to indicate what instruments are bills of exchange requiring a presentment for acceptance.

§ 206. **Paper requiring presentment for acceptance.**—The instruments which require presentment for acceptance in order to hold certain parties upon them are classed under the head of bills of exchange; but not all bills of exchange need presentment for acceptance in order to fix the liability of parties to them. First, it will be necessary to indicate what instruments are bills of exchange, and then it will be necessary to show what bills of exchange need presentment for acceptance. Checks are not bills of exchange unless they are made payable after their date. A check is an order

¹ See § 150, *ante*.² See § 150, *ante*.³ See § 161, *ante*.

for the payment of money drawn upon a bank or banker.¹ It is of the essence of such an order that it be payable upon demand. It is needless to say that such a check does not need to be presented for acceptance, nor is it entitled to days of grace.² A draft of one bank upon another is merely a check,³ though it be drawn in duplicate;⁴ even if it be payable upon sight, it is a check, not a bill of exchange.⁵ An order upon a banker for the payment of money in the usual form, whether drawn by a bank or other person, is payable upon demand, and is not an inland bill of exchange.⁶ But checks are sometimes post-dated. This word is used in two senses. A check in the ordinary form, signed and delivered before its date, is sometimes called a post-dated check, but that is a wrong use of the term. The only effect upon such a check of the date is that it is not payable until its date.⁷ But it does not become entitled to days of grace, nor is there any necessity for its presentment. It is simply of no effect

¹In *re Brown*, 2 Story, 502. But *Industrial Bank v. Bowes*, 165 Ill. 70, holds that an order upon an architect's certificate is a check, not a bill of exchange. The order was drawn not upon a banking house. The decision should have been put on the ground that the order was not a bill of exchange nor a check, but was simply the assignment of an account.

²See the cases in note 8, *infra*. In *re Brown*, 2 Story, 502; *Taylor v. Wilson*, 11 Met. 44; *Way v. Towle*, 155 Mass. 374; *Hawley v. Jette*, 10 Oreg. 31; *McDonald v. Stokely*, 1 Mont. 388. And see cases cited in note 6, *infra*. Otherwise the rules governing checks and bills of exchange are practically the same, except as to the rights of the drawer, who can claim a demand only when he is injured by the delay. If injured, he is in the same position as the drawer of a bill. The

general similarity of checks and bills of exchange is noticed in *Merchants' Bank v. State Bank*, 10 Wall. 604; *Rogers v. Durant*, 140 U. S. 298; *Henshaw v. Root*, 60 Ind. 220; *Wood River Bank v. First Nat. Bank*, 36 Neb. 744; *Laird v. State*, 61 Md. 309; *Smith v. Janes*, 20 Wend. 192.

³*Bull v. Kasson Bank*, 123 U. S. 105; *First Nat. Bank v. Coates*, 8 Fed. R. 540; *Merchants' Nat. Bank v. Ritzinger*, 118 Ill. 484; *Harrison v. Wright*, 100 Ind. 515.

⁴*Merchants' Nat. Bank v. Ritzinger*, 118 Ill. 484.

⁵*Grammel v. Carmer*, 55 Mich. 201.

⁶*Merchants' Bank v. State Bank*, 10 Wall. 604; *Exchange Bank v. Sutton Bank*, 78 Md. 577; *Roberts v. Austin*, 26 Iowa, 315; *McDonald v. Stokely*, 1 Mont. 388; *Harrison v. Wright*, 100 Ind. 515.

⁷See § 152, *ante*, note 3.

until its date, when it becomes an ordinary check. But a true post-dated check is one that shows upon its face that it is not payable until a day later than its date. Such a check is an inland bill of exchange, and as such is entitled to days of grace.⁸ But whether it is necessary to present it for acceptance must be determined by the rule applicable to bills of exchange. That rule is that a bill of exchange payable upon a fixed day need not be presented for acceptance;⁹ but if the bill of exchange or anything that falls under that classification is payable so many days after sight or after demand¹⁰ or at sight,¹¹ presentment for acceptance is necessary in order to hold one who is entitled to claim a presentment for acceptance. Bills payable upon demand do not require presentation for acceptance for the reason that they have no days of grace.

§ 207. Paper which is not a bill of exchange.—As before stated, checks in the ordinary form payable upon demand are not bills of exchange,¹ nor are orders payable out of a particular fund,² even though they have been accepted;³

⁸ *Minturn v. Fisher*, 4 Cal. 35; if one-day bill. *Craig v. Price*, 23 Cutler v. Reynolds, 64 Ill. 321; Ark. 633. *Georgia Nat. Bank v. Henderson*, 46 Ga. 487; *Harrison v. Nicolle* Nat. Bank, 41 Minn. 488; *Ivory v. State Bank*, 36 Mo. 475; *Brown v. Lusk*, 4 Yerg. 210. Compare *Andrew v. Blachly*, 11 Ohio St. 89; *Morrison v. Bailey*, 5 Ohio St. 13. *Contra* are the first three cases in note 2, *supra*.

⁹ *Bank of Washington v. Triplett*, 1 Pet. 25; *Townsley v. Sumrall*, 2 Pet. 170; *Oxford Bank v. Davis*, 4 Cush. 188; *Taylor v. Bank of Illinois*, 7 T. B. Mon. 576.

¹⁰ See cases last cited, and *Austin v. Rodman*, 8 N. C. 194; *Commercial Bank v. Perry*, 10 Rob. (La.) 61. Must be presented for acceptance

¹¹ *Hart v. Smith*, 15 Ala. 807; *Commercial Bank v. Perry*, *supra*. *Contra*, *Forrest v. Rawlings*, 35 Tex. 626, *semble*. The rule that the sight bill should be presented is correct, because it is entitled to days of grace, and acceptance or presentment therefor determines the day from which the days of grace begin.

¹ See note 6 to preceding section.

² *Virginia v. Turner*, 1 Cranch, C. C. 261; *Gillilan v. Myers*, 31 Ill. 525; *Kelly v. Bronson*, 26 Minn. 359; *Owen v. Lavine*, 14 Ark. 389; *Agnel v. Ellis*, 1 McGloin, 57; *Mills v. Kuykendall*, 2 Blackf. 47; *Lanfear v. Blossom*, 1 La. Ann. 148; *Harriman v. Sanborn*, 43 N. H. 128; *Ehrichs*

³ *Owen v. Lavine*, 14 Ark. 389; *Agnel v. Ellis*, 1 McGloin, 57.

nor are orders payable upon a contingency,⁴ even though the contingency has ceased to be a contingency by the happening of an event, and even though the bill has been accepted.⁵ But the mention in the bill of a particular fund which the drawee may use to reimburse himself,⁶ or the mention in the bill of the consideration for it or of the account to which the bill is to be applied,⁷ does not affect the character of the instrument as a bill of exchange, if it is otherwise a good bill,⁸ the sole requisite being, if the formal requisites appear, that the bill be issued on the personal credit of the drawer. Municipal orders or warrants for the payment of money are not bills of exchange;⁹ they are merely evidences of indebtedness of the municipal organization.¹⁰ Some courts have denied to them the qualities of commercial paper,¹¹ but the better rule is that they are ne-

v. De Mill, 75 N. Y. 370; *Lindsay v. Price*, 33 Tex. 280; *Van Vacter v. Flack*, 1 Smedes & M. 393. *Reeside v. Knox*, 2 Wheat. 253, applies this rule to an order upon a government officer for moneys due from the government.

⁴ *Miller v. Excelsior Stone Co.*, 1 Bradw. 273; *Raignel v. Ayliff*, 16 Ark. 594; *Kingbury v. Wall*, 68 Ill. 311.

⁵ *Cook v. Satterlee*, 6 Cow. 108 (contingency and accepted); *Miller v. Excelsior Stone Co.*, 1 Bradw. 273 (contingency had happened).

⁶ *Early v. McCart*, 2 Dana, 414; *Redman v. Adams*, 51 Me. 429; *Wells v. Brigham*, 6 Cush. 6; *Cour- sen v. Leadlie*, 31 Pa. 506; *Corbett v. Clark*, 45 Wis. 403; *Adams v. Boyd*, 33 Ark. 33; *Spurgin v. McPheeters*, 42 Ind. 527.

⁷ *Lowery v. Steward*, 3 Bosw. 505, 25 N. Y. 239; *Hillstromi v. Anderson*, 46 Minn. 382.

⁸ That is to say, if it contains the formal elements of a good bill. The

cases in the last two notes make this matter plain.

⁹ *Bayerque v. City of San Francisco*, Fed. Cas. No. 1137 (city warrant); *Dana v. City of San Francisco*, 19 Cal. 486 (city warrant); *Koch v. Branch*, 44 Mo. 542 (United States commissary warrant); *Warner v. Commonwealth*, 1 Pa. 154 (county warrant); *Jerome v. County Commissioners*, 18 Fed. R. 873 (county warrant); *Boardman v. Hayne*, 29 Iowa, 339 (school order); *Matthis v. Town of Cameron*, 62 Mo. 504; *First Nat. Bank v. Rush School Dist.*, 32 P. F. Smith, 307.

¹⁰ *Floyd County Comm'r's v. Day*, 19 Ind. 450; *Brownlee v. Madison Co. Comm'r's*, 81 Ind. 186 (county order refunding taxes); *Carnegie v. Beattyville Trustees*, 13 Ky. Law R. 431; *Clark v. City of Des Moines*, 19 Iowa, 199; *Bull v. Simms*, 23 N. Y. 570; *Read v. City of Buffalo*, 67 Barb. 526.

¹¹ *Jerome v. County Comm'r's*, 18 Fed. R. 873; *Boardman v. Hayne*,

gotiable so as to enable the transferee to sue in his own name at law if they are made so by their terms.¹²

§ 208. Paper not requiring presentment for acceptance.

Certain forms of bills of exchange are considered as accepted, by the form of them. Thus, a bill by one partner upon his firm drawn in regard to a partnership transaction is the accepted bill of the firm.¹ The reasons for so holding are obvious. The bill of an agent upon his principal, where the agent is authorized to draw, or where the principal receives the money or thing of value upon the bill, is an accepted bill or, what amounts to the same thing, a promissory note of the principal,² and the same rule would apply to orders of the principal upon his agent.³ The drafts of officers of corporations upon the corporation or upon another officer of the corporation are merely one phase of the rule as to principal and agent,⁴ and therefore such bills or drafts or orders do not require acceptance.⁵ They may be considered either promissory notes

29 Iowa, 339; *Matthis v. Town of Cameron*, 62 Mo. 504; *First Nat. Bank v. Rush School Dist.*, 32 P. F. Smith, 307.

¹² *Varner v. Nobleborough*, 2 Me. 121. But they cannot be negotiable in the sense that the assignee takes free from the defense of want of power.

¹ *Dougal v. Cowles*, 5 Day, 511.

² *Burnheisel v. Field*, 17 Ind. 609; *Clark v. Lake Ave. Ass'n*, 20 N. Y. Supp. 363, hold they are accepted bills. But it is said they are not promissory notes which pass by indorsement free of equities. *Ashland Banking Co. v. Centralia Mut. Ass'n*, 1 Kulp, 38; but the case is wrong. The defense by the corporation was *ultra vires*, but it was estopped because it had received full value. They are promissory notes. *Indiana R. Co. v. Davis*, 20 Ind. 6; *Maux Ferry Co. v. Brane-*

gan, 40 Ind. 361; *Hasey v. White Pigeon Co.*, 1 Doug. 193; *Western Mfg. Co. v. Toole*, 11 Pac. R. (Ariz.) 119; and these last cases say they are also bills accepted. The following cases hold them to be bills of exchange: *Kaskaskia Bridge Co. v. Shannon*, 6 Ill. 15 (a demand on the drawee is necessary, but no notice of dishonor is required); *Wetumpka R. Co. v. Bingham*, 5 Ala. 657 (a demand on the drawee and notice of dishonor are both necessary).

³ They are promissory notes. *Hardy v. Pilcher*, 57 Miss. 18; *Poydras v. Delamere*, 13 La. 98.

⁴ *Hazard v. Cole*, 1 Idaho, 276. And see cases in note 2, *supra*.

⁵ *Baker v. Montgomery*, 4 Mart. (O. S.) 90; *Western Mining Co. v. Toole*, 11 Pac. R. 119; *Rio Grande Ex. Co. v. Coby*, 7 Colo. 299; *Fairchild v. Ogdensburgh Co.*, 15 N. Y. 337; *Mobley v. Clark*, 28 Barb. 390;

or accepted bills; the sole question is upon the authority of the agent.⁶ But it has been said that such bills may be considered as ordinary bills of exchange,⁷ and the reasonable rule would be that the holder could consider the instrument either a bill of exchange or a promissory note, at his option, where it is capable of two constructions.⁸ Such bills, from another standpoint, may be considered as a species of bill drawn by the drawer upon himself. All bills drawn by the drawer upon himself are promissory notes of the drawer⁹ or accepted bills,¹⁰ both phrases meaning in that connection the same thing. But where the drawer of the bill and the payee are the same person, the document, when indorsed, is a bill of exchange;¹¹ but another court says the document is a promissory note,¹² especially if signed across its face by the drawer or indorsed by the drawer.¹³ A bill drawn with the drawer's name omitted is either the accepted bill or the promissory note of the drawer;¹⁴ but if the bill is accepted by

McCormick v. Hickey, 24 Mo. App. 362. But see note 2, *supra*.

⁶ See the cases in note 3, *supra*, and Raymond v. Mann, 45 Tex. 301; Bailey v. Southwestern R. Bank, 11 Fla. 266; Stafford v. Bratcher, 4 Ky. Law R. 996, holding that they are of course open to defenses in the same way as promissory notes. If the agent is authorized to draw the bill, it is a bill drawn by the corporation or person upon himself. See notes 11 and 12, *infra*, and note 5, *supra*.

⁷ See cases in note 2, *supra*.

⁸ Brazelton v. McMurray, 44 Ala. 323; Bradley v. Mason, 6 Bush, 603. And see cases in note 2, *supra*.

⁹ Wardens v. Moore, 1 Ind. 289; Hasey v. White Pigeon Co., 1 Doug. 193; McCandlish v. Cruger, 2 Bay, 377. But see Randolph v. Parish, 9 Port. 96.

¹⁰ See the last note, and Cunning-

ham v. Wardwell, 12 Me. 466. But Kaskaskia Bridge Co. v. Shannon, 6 Ill. 15, requires demand, and Wetumpka R. Co. v. Bingham, 5 Ala. 65, requires notice.

¹¹ Wildes v. Savage, 1 Story, 22; Bank of Brit. North Am. v. Barling, 46 Fed. R. 357; Hart v. Shorter, 46 Ala. 453; Rice v. Hogan, 8 Dana, 133. A bill drawn by a partner payable to his firm is not negotiable except by the firm's indorsement.

¹² Lewis v. Harper, 73 Ga. 564. See note 8, *supra*.

¹³ Patillo v. Mayer, 70 Ga. 715; De Vaugh v. Haughabook, 73 Ga. 809; Planters' Bank v. Evans, 36 Tex. 592.

¹⁴ Bradley v. Mason, 6 Bush, 602; Almy v. Winslow, 126 Mass. 342; Petillon v. Lorden, 86 Ill. 361; Brooks v. Brady, 53 Ill. App. 155; Bunting v. Mick, 5 Ind. App. 289. See Wat-

another person the omission is immaterial, since the acceptance shows the person intended.¹⁵

§ 209. Waiver of acceptance.—The instances specified in the foregoing section may be considered as cases where an acceptance was waived as to the drawer by act of the drawer. There are other instances where the drawer waives an acceptance. If he give notice to the drawee not to pay the draft, his direction is a waiver of presentment for acceptance as to himself,¹ but not, it would seem, as to an indorser ignorant of the direction. A direction written upon the bill waiving an acceptance is a waiver as to all parties to the bill,² because all parties dealing with the paper have full notice thereof. But the drawer may waive a presentation for acceptance by parol, and such a waiver would be good against himself,³ but ought not to be good against an indorser ignorant of the fact. On any theory of an indorser's liability upon a bill requiring presentation for acceptance upon its face, he ought to be held liable only for those matters in connection with the bill of which he has notice. His contract does not contemplate any dealing between the holder of the bill and the drawer to his prejudice. If, however, the acceptor waives presentment for acceptance and acceptance, the bill is accepted as to all parties to it.⁴

rous v. Halbrook, 39 Tex. 572. If it be unsigned, but accepted, it may be shown to be a bill by proper averments. Bliss v. Burnes, McCahon, 91. An order which has no drawee, and is payable to bearer, is good only in the hands of a *bona fide* holder. Ball v. Allen, 15 Mass. 433. As to checks, see Ellis v. Wheeler, 3 Pick. 18.

¹⁵ Wheeler v. Webster, 1 E. D. Smith, 1. He is therefore not a stranger.

¹ Neederer v. Barber, Fed. Cas. No. 10,079.

² Webb v. Mears, 45 Pa. 222.

³ The same rule would apply to any indorser.

⁴ This waiver may be implied, it will be seen later, from a promise to accept made beforehand. But whether this kind of a waiver would be good as against the drawer and indorser does not seem to be open to question. There ought to be no doubt that the drawee's waiver of acceptance, since it becomes an acceptance, is just the same as if the drawer had written his acceptance on the bill. The bill has not been dishonored, and therefore the drawer and indorsers

§ 210. What law governs acceptance.— Since the rule in different jurisdictions varies under statutory enactments as to the form of an acceptance, it becomes a matter of some importance to ascertain what law governs the contract of acceptance. The general rule would be that the law of the place where the acceptance was to be made would determine the sufficiency of the acceptance.¹ This would be the place where the bill is made payable.² If the bill be accepted where payable the contract is governed by the law of that place;³ but if a bill be drawn in one place payable at another place and be accepted in the former place, it has been held that the acceptance is governed by the law of the former place.⁴ This ruling seems questionable because the acceptance made the bill the acceptor's promissory note payable at the place where the bill was payable. If it is a promise to accept which is in question, and the agreement is to accept bills at a certain place, the law governing the promise would be the law of the place where it was agreed to accept

cannot be considered in any way prejudiced on any theory of the nature of their conditional obligation.

¹ *Hunt v. Standart*, 15 Ind. 33; *Frazier v. Warfield*, 9 Smedes & M. 220; *Bright v. Judson*, 47 Barb. 29; *Garretson v. North Atchison Bank*, 47 Fed. R. 867; *Lonsdale v. Lafayette Bank*, 18 Ohio, 126. What the court decides in this case is right, but its reasons are wrong. The point was made that the contract was governed by the law of Louisiana, and that law not being proven no recovery could be had. The court accepts this proposition with childlike confidence, and decides that the Ohio law governs. It ought to have said that the foreign law not being proven it would be presumed to be the same as the law of Ohio. *Mason v. Dousay*, 35 Ill. 424.

There is one extraordinary opinion by Justice Hunt (*Scudder v. Union Nat. Bank*, 91 U. S. 406) which is absolutely incomprehensible, but apparently it contradicts the above rule. The opinion, however, contradicts itself.

² If the bill were not expressly made payable somewhere it would be the address of the drawee if the bill gave an address; otherwise it would be his actual address. Suppose, however, the drawee had a place of business in New York, but a residence in New Jersey. It would seem that the place of actual acceptance would govern. *Worcester Bank v. Wells*, 8 Met. 107; *Kelly v. Smith*, 1 Met. (Ky.) 313.

³ See cases cited in note 1, *supra*.

⁴ *Scudder v. Union Nat. Bank*, 91 U. S. 406.

the bills;⁵ but if the agreement to accept bills to be drawn be made generally, although the drafts were payable in another state than the one wherein the agreement was made, it seems that the law of the state wherein the agreement was made governs the transaction.⁶

§ 211. **Sufficiency of presentment for acceptance.**—The bill should be presented by the holder or his agent to the drawee personally, or to some one designated by him, and a diligent attempt should be made to find him.¹ But a presentment at the place of business or counting-room of a merchant to one of the clerks where the merchant was not in was held to be sufficient,² and the absence of the drawee from home need not be treated as a refusal to accept.³ While the presentment should be personal or at the drawee's place of business or residence, the inclosure of the draft in a letter to the drawee with the receipt of an answer refusing to accept is sufficient.⁴ There is no absolute rule as to exhibiting the bill by the person presenting it. It is sufficient that the person has the bill ready to present if it should be demanded.⁵ Should the drawee be temporarily absent the bill may be held without protesting for a reasonable time to await his return.⁶ No rule can be given for the time within which a bill must be presented for acceptance, except that it should be presented within a reasonable time⁷ and before maturity.⁸

⁵ Hall v. Cordell, 142 U. S. 116; Coghlan v. So. Car. R. Co., 142 U. S. 101; Barney v. Newcomb, 9 Cush. 46. *Contra*, Russell v. Wiggan, 2 Story, 213.

⁶ Exchange Bank v. Hubbard, 62 Fed. R. 112, 26 U. S. App. 133; Scott v. Pilkington, 15 Abb. Pr. 280. It seems impossible to reconcile these cases with those in note 5, *supra*.

¹ Wiseman v. Chiappela, 23 How. 368; Sharpe v. Drew, 9 Ind. 281.

² Whaley v. Houston, 12 La. Ann. 585; Stainback v. Bank of Virginia, 11 Gratt. 260.

³ Bank of Washington v. Triplett, 1 Pet. 35. Absence from his place of business can be so treated. Wiseman v. Chiappela, 23 How. 368.

⁴ Carmichael v. Pennsylvania Bank, 4 How. (Miss.) 567.

⁵ First Nat. Bank v. Hatch, 78 Mo. 13; Fisher v. Beckwith, 19 Vt. 31.

⁶ Wiseman v. Chiappela, 23 How. 368.

⁷ Fugett v. Nixon, 44 Mo. 295; Salisbury v. Renick, 44 Mo. 554; Linville v. Welch, 29 Mo. 203.

⁸ Bachellor v. Priest, 12 Pick. 399. Compare Prescott Bank v. Courly,

What is a reasonable time must depend wholly upon circumstances.⁹ But bills payable at sight or after sight may be negotiated and put into the usual channels of trade, and so long as they are not held by any holder an unreasonable length of time the drawers will not be released where the bill is protested for non-acceptance.¹⁰ The sections upon presentment for payment should be compared with this.

§ 212. Written acceptances.— Various statutes require acceptances to be in writing and unconditional.¹ Acceptances of checks are held to be within the terms of these statutes.² Under these statutes, and *a fortiori* where there is no such statute, blank acceptances by the acceptor, consisting merely of signing the acceptor's name³ or writing the name on the face of the bill,⁴ are sufficient. The words "except"⁵ or "accepted" or "presented" or "seen"⁶ are

⁷ Gray, 217; Robinson v. Ames, 20 Johns. 146; Jordan v. Wheeler, 20 Tex. 698; Aymer v. Biers, 7 Cow. 705; Depau v. Brown, Harp. 251.

⁹ Linville v. Welch, 29 Mo. 203. The holder is not responsible for a delay in the mail. Walsh v. Blatchley, 6 Wis. 422.

¹⁰ Wallace v. Agry, 4 Mason, 336. In this case, which is a charge to the jury, Judge Story shows his tendency to be inaccurate. He said bills payable so many days after date must be presented before maturity, while bills payable so many days after sight might be negotiated. The two things are essentially different. The one class of bills need not be presented for acceptance at all; the other class must be. For other illustrations see cases in note 7, *supra*.

¹ New York Bank v. Gibson, 5 Duer, 574.

² Garretson v. North Atchison Bank, 47 Fed. R. 867; Duncan v.

Berlin, 60 N. Y. 151; First Nat. Bank v. Nelson, 105 Ala. 180. Other statutes are noticed in Wheatly v. Strobe, 12 Cal. 92; Flato v. Mulhall, 72 Mo. 522; Hall v. Flanders, 83 Me. 242; Upham v. Clute, 105 Mich. 350.

³ Moiese v. Knapp, 30 Ga. 942. This was a blank acceptance delivered before the draft was filled out. Fowler v. Gate City Nat. Bank, 88 Ga. 29; Wheeler v. Webster, 1 E. D. Smith, 1 (under statute); Mechanics' Bank v. Yager, 62 Miss. 529 (under statute); Kaufman v. Barringer, 20 La. Ann. 419 (under statute); Haines v. Nance, 52 Ill. App. 405 (this was a case of name indorsed on back of the bill).

⁴ Spear v. Pratt, 2 Hill, 582; Walters v. Galveston R. Co., 1 White & W., § 757.

⁵ Miller v. Butler, 1 Cranch, C. C. 470; Vanstrum v. Liljengren, 37 Minn. 191; Cortelyou v. Maben, 22 Neb. 697.

⁶ Spear v. Pratt, 2 Hill, 582. A

sufficient, or the words "I will see the within paid eventually" are a good acceptance when written on the bill.⁷ But an oral promise to pay the bill is not sufficient under the statute⁸ although accompanied by an acknowledgment of the possession of funds.⁹ If the acceptor refuses to accept, but writes something upon the bill which may fairly be construed as an acceptance, he will be bound to a *bona fide* holder.¹⁰ A written promise to pay the bill would be an acceptance under this statute,¹¹ and on principle any writing which would be good proof of a written acceptance without the statute ought to be held a sufficient acceptance under the statute.¹² Since the words "I take notice of the above" are not an acceptance without the statute, even when written,¹³ they ought not to be so considered under the statute. So of a part payment of the bill,¹⁴ or of words evidencing an intent not to accept, though signed by the acceptor.¹⁵ But a blank indorsement would probably be considered a good written acceptance whether under the statute or at common law.¹⁶ But the fact that the acceptance is oral when it is required to be in writing can be made as an objection, it is held on the analogy of the statute of frauds, only by the acceptor;¹⁷ and although the written or oral order may not be enforceable as an acceptance for want of a written acceptance, it may yet be good as an assignment of a sum due,¹⁸ provided it be in proper form.

guaranty is sufficient. *Block v. Wilkerson*, 42 Ark. 253.

⁷ *Brannin v. Henderson*, 12 B. Mon. 61.

⁸ See cases in note 2.

⁹ *Pope v. Luff*, 7 Hill, 577. See *De Liquero v. Munson*, 11 Heisk. 15.

¹⁰ *Gallagher v. Black*, 44 Me. 99.

¹¹ *O'Donnel v. Smith*, 2 E. D. Smith, 124.

¹² There are no cases which so state.

¹³ *Cook v. Baldwin*, 120 Mass. 317.

¹⁴ *Cook v. Baldwin*, 120 Mass. 317.

¹⁵ *Norton v. Knapp*, 64 Iowa, 112.

The acknowledgment in writing of the receipt of the bill is not an acceptance (*Smith v. Milton*, 133 Mass. 369); but if accompanied by a promise to pay, it is. *Pope v. Huth*, 14 Cal. 403.

¹⁶ See *Haines v. Nance*, 52 Ill. App. 406.

¹⁷ *Ulrich v. Hower*, 156 Pa. 414, *semble*; *Moeser v. Schneider*, 158 Pa. 412. *Contra*, *Erickson v. Inman Poulson Co.*, 54 Pac. R. 949.

¹⁸ *Trumbower v. Ivey*, 2 Pa. Co. Ct. R. 470; *Ulrich v. Hower*, 156 Pa. 414. And see *Luff v. Pope*, 5 Hill, 413.

§ 213. **Oral acceptances.**—Where no statute requires an acceptance to be in writing it is well settled that an oral acceptance is sufficient.¹ Such an acceptance may be considered as made by words or by conduct. Acceptances by conduct will be considered in the next section as implied acceptances. But the general principle applicable to all acceptances at common law is that an acceptance will be evidenced by any act clearly expressing an intention to honor the document.² Written acceptances good at common law are noticed in the last section. Oral acceptances are good at common law whether they be of a bill of exchange,³ a check⁴ or a non-negotiable order for the payment of money,⁵ except that even an absolute acceptance of a non-negotiable order, some authority holds, must be supported by a consideration,⁶ while the acceptance of a bill of exchange or check absolutely imports a consideration.⁷ The words from which an acceptance is inferred should not be equivocal.⁸ Thus, a promise to pay accompanied by a refusal to accept ought not to be considered an acceptance.⁹ But a promise to pay at a future day or generally¹⁰ is an acceptance. The statements that

¹ Leonard v. Mason, 1 Wend. 522; White v. Dienger, 25 S. W. R. 666 (Tex.); Barnet v. Smith, 30 N. H. 256; Williams v. Winans, 14 N. J. Law, 339; Pierce v. Kittridge, 115 Mass. 374; Arnold v. Sprague, 34 Vt. 402; Spalding v. Andrews, 48 Pa. 411.

² Adressen v. First Nat. Bank, 2 Fed. R. 122; Norton v. Knapp, 64 Iowa, 112. Compare Peck v. Cochran, 7 Pick. 34; Robbins v. Lambeth, 2 Rob. (La.) 304.

³ Jarvis v. Wilson, 46 Conn. 90; Heilschmidt v. McAlpine, 59 Ill. App. 231; Spurgeon v. Swain, 13 Ind. App. 188.

⁴ See § 150, *ante*.

⁵ Bird v. McElvine, 10 Ind. 40; Dull v. Bricker, 76 Pa. 255; Miller v. Neihaus, 51 Ind. 401.

⁶ Walton v. Mandeville, 56 Iowa, 597. The court in this case did not see the difference between an acceptance and a promise to accept. *Contra*, Green v. Duncan, 37 S. C. 239. The latter case is right, for an acceptance is not within the statute of frauds; and since it is a promise to perform one's own obligation it is binding without a consideration. See Kelly v. Greenough, 9 Wash. 659.

⁷ See cases cited in preceding notes, and for checks see § 150, *ante*.

⁸ Walker v. Lide, 1 Rich. Law, 249; McEwen v. Scott, 49 Vt. 376.

⁹ Luff v. Pope, 5 Hill, 413. The statement in the opinion is *dictum* because the want of a writing was fatal.

¹⁰ In re Goddard, 66 Vt. 415;

the document is correct and ought to be paid,¹¹ or that the acceptor "cannot pay now, but will later,"¹² or "it is all right, and I have told (the payee) that I will pay it in thirty or sixty days,"¹³ are acceptances. But such a promise must be received as an acceptance,¹⁴ and such a promise accepted as an acceptance inures to all the holders of the bill.¹⁵ If the draft is addressed generally to the drawee, it may be accepted by him payable at a particular place.¹⁶

§ 214. Implied acceptances.—Where conduct of the drawee is relied upon as an acceptance, it must be in a jurisdiction where oral acceptances are valid.¹ The acts of the acceptor may be proven just as his words may be proven.² Mere retention of the instrument, it is said, is not sufficient,³ but a retention which injures the holder may become an acceptance,⁴ just as retention of a check may amount to an acceptance.⁵ It has been held that a retention of an order, even when the drawee writes his name upon it, is not an acceptance where the fact of writing the name is not communicated to the holder.⁶ At any rate the drawee is entitled

Hatcher v. Stallworth, 25 Miss. 376;
Edson v. Fuller, 22 N. H. 183; *McPherson v. Walton*, 42 N. J. Eq. 282;
Short v. Blount, 99 N. C. 49; *Fisher v. Beckwith*, 19 Vt. 31.

¹¹ *Ward v. Allen*, 2 Met. 53.

¹² *St. Louis Nat. Stock Yards v. O'Reilly*, 85 Ill. 546.

¹³ *Mason v. Dousay*, 35 Ill. 424.

¹⁴ *Vermont Marble Co. v. Mann*, 36 Vt. 697.

¹⁵ *Spalding v. Andrews*, 48 Pa. 411. This promise, however, should be made to or at least known to the holder. *Martin v. Bacon*, 2 Const. R. 132; *Exchange Bank v. Rice*, 107 Mass. 37; *Rogers v. Union Stone Co.*, 130 Mass. 581; *Clement v. Erle*, 130 Mass. 585. See §§ 299, 302, *post*, as to such promises on part of indorser.

¹⁶ See § 229, *post*.

¹ This may be modified by the statement that a man may by his conduct estop himself from insisting upon a written acceptance. See the cases cited in note 1, § 213, upon the general principle.

² *Bruner v. Nisbet*, 31 Ill. App. 517; *McCutchen v. Rice*, 56 Miss. 455.

³ *Colorado Nat. Bank v. Boettcher*, 5 Colo. 185; *Hall v. Steel*, 68 Ill. 231; *Holbrook v. Payne*, 151 Mass. 383; *Briggs v. Sizer*, 30 N. Y. 647. Under a statute, see *Dickenson v. Marsh*, 57 Mo. App. 566; *Matteson v. Moulton*, 11 Hun, 268, 79 N. Y. 627.

⁴ *Taggart v. First Nat. Bank*, 12 Wash. 538. See also *Dunavan v. Flynn*, 118 Mass. 537.

⁵ See § 146, *ante*.

⁶ *Dunavan v. Flynn*, 118 Mass. 537.

to a reasonable time in which to examine his accounts to ascertain whether he will accept or not;⁷ and a retention from Saturday until the following Monday is not an acceptance.⁸ But if a drawer retains the bill and discounts it, his conduct amounts to an acceptance.⁹ There is considerable authority for saying that the receipt and disposal of property with knowledge that a draft has been drawn against it is an acceptance of the draft,¹⁰ but this is denied.¹¹ If a letter of advice accompanies the shipment, and the direction is known to the holder of the draft, it is held that the drawee is bound to apply the proceeds as indicated in the letter.¹² And if the drawee settles with the drawer, reserving enough to pay the draft, the drawee, it has been held, must pay the draft, though it be not accepted;¹³ yet if the drawee interpleads the payee and attaching creditors of the drawer, his act will not be an acceptance where the drawer has recovered the fund from him.¹⁴

§ 215. Promises to accept and letters of credit.—Promises to accept a bill or order or check before it is drawn may arise either from an actual promise, oral or written, or from an authority given to draw the bill. Each instance may be considered as an offer on the part of the drawee, and an ac-

Here there was no delivery. A delivery was necessary.

⁷ See the case cited in the next note.

⁸ *Sands v. Matthews*, 27 Ala. 399.

⁹ *Rutland Bank v. Woodruff*, 34 Vt. 89.

¹⁰ *Hall v. First Nat. Bank*, 133 Ill. 234. The court in this case seems not to have had the slightest knowledge that there was any dispute about the legal question involved. *McCausland v. Wheeler Sav. Bank*, 43 Ill. App. 381; *Mitting v. Sloan*, 57 Ga. 392.

¹¹ *Clements v. Yeates*, 69 Mo. 623; *Relf v. Mobile Bank*, 20 Pa. 435;

Johnson v. Clark, 50 N. E. R. 762. The order may be an assignment if in proper form. See § 224, note 7.

¹² *Cowperthwaite v. Sheffield*, 1 Sandf. 416, 3 N. Y. 243.

¹³ *Miltenberger v. Attwood*, 18 How. Pr. 330. But for checks see § 150, *ante*.

¹⁴ *Missouri Pac. Ry. Co. v. Wright*, 38 Mo. App. 141. This opinion seems to be wrong. The drawee elected to treat himself as having accepted. He could not thereafter change his position. If he had not accepted he had no right to interplead the payee.

ceptance of the offer on the part of the person who takes the bill. Wherever the common law has not been changed by statute, an oral promise, whether made as a promise or by granting authority to draw a bill, made before a bill is drawn by the drawee agreeing to accept it, is certainly binding as a promise to any one who took the bill upon the strength of the promise,¹ and such a promise is not within the statute of frauds.² Even under a statute requiring a written acceptance there is usually a saving of the right to rely upon an oral promise to accept to one who drew a bill or negotiated a bill upon the strength of the promise, but the statute does not cover one to whom a bill was negotiated.³ The promise is usually held to inure only to one who loaned or gave credit to the bill upon the strength of the promise,⁴ and only to an indorsee who took the bill upon the strength of the promise.⁵ But other cases which are not entitled to the slightest weight, because they are either palpable blunders or bold specimens of judicial effrontery, hold that the promise inures to any indorsee⁶ or to any holder of the bill whether he knew of it or not.⁷ But in the case of banks it must be remembered that the promise to accept may be rendered invalid by the fact that the promise is *ultra vires*,

¹ *Havens v. Griffin*, N. Chip. 23; *Scudder v. Union Nat. Bank*, 91 U. S. 406; *Hall v. Cordell*, 142 U. S. 116 (following common law in Illinois); *Ontario Bank v. Worthington*, 12 Wend. 593; *Howland v. Carson*, 15 Pa. 453; *Martin v. Bacon*, 2 Const. R. 132; *Crowell v. Van Bibber*, 18 La. Ann. 637.

² *Kelley v. Greenough*, 9 Wash. 659.

³ *Hall v. Cordell*, 142 U. S. 116, and cases cited therein.

⁴ *Exchange Bank v. Hubbard*, 62 Fed. R. 112; *Union Bank v. Coster*, 3 N. Y. 203; *Russell v. Wiggin*, 2 Story, 214; *Franklin Bank v. Lynch*, 52 Md. 270; *Leegrue v. Woodruff*,

29 Ga. 648; *Woodward v. Commission Co.*, 43 Minn. 260; *Lewis v. Kramer*, 3 Md. 265; *Lowery v. Steward*, 25 N. Y. 239; *Kennedy v. Geddes*, 8 Port. 263; *Ontario Bank v. Worthington*, 12 Wend. 593; *Howland v. Carson*, 15 Pa. 453; *Martin v. Bacon*, 2 Const. R. 132.

⁵ See last four cases in preceding note.

⁶ *Springfield Marine Bank v. Mitchell*, 48 Ill. App. 486, *semble*; *Jones v. Iowa Bank*, 34 Ill. 313; *Read v. Marsh*, 5 B. Mon. 8. *Second Nat. Bank v. Diefendorf*, 90 Ill. 396, really overrules the Illinois cases.

⁷ See cases in last note.

and therefore worthless as an obligation of the bank.⁸ Written promises to accept bills arise in various ways. Authority may be given to purchase something and draw drafts for the price. Such authority, when acted upon, necessitates the writer's acceptance of the draft.⁹ Such a letter is practically a letter of credit, and any person who advances money upon the letter may rely upon it, if unrevoked, as an authority for the addressee of the letter to create the debt.¹⁰ It is said that such an authority is not an acceptance, where it is general and does not describe the bill, but that it is good as an authority and as a contract.¹¹ It renders the promisor liable for the face of the draft as a general rule, but in some instances he may be liable only for inconvenience and loss.¹² The letter of credit may be safely acted upon, if unrevoked, by any other person than the one to whom it is directed, and no notice to the writer is required of the fact that the offer in the letter is accepted and that bills have been drawn under it.¹³ Practically the letter is an acceptance in advance,¹⁴ although at common law it would hardly be safe to declare upon it as an acceptance. But a letter written within a reasonable time before or after the date of a bill, intelligibly describing it, and promising to accept it, is, if shown to one who takes the bill upon the credit of the letter, an acceptance binding upon the promisor.¹⁵

⁸ See § 126, *ante*, notes 1-4.

⁹ *Johnson v. Blakemore*, 28 La. Ann. 140; *Burke v. Utah Nat. Bank*, 47 Neb. 247; *Nelson v. First Nat. Bank*, 48 Ill. 36 (in this case the promise was *ultra vires*); *Riggs v. Lindsay*, 7 Cranch, 500; *Saulsbury v. Blandys*, 65 Ga. 45; *Sturges v. Fourth Nat. Bank*, 75 Ill. 595.

¹⁰ *Storer v. Logan*, 9 Mass. 55; *Lienow v. Pitcairn*, Fed. Cas. No. 8341.

¹¹ *Boyce v. Edwards*, 4 Pet. 111; *Cassel v. Dows*, 1 Blatchf. 335; *Carrollton Bank v. Tayleur*, 16 La. 490; *Von Phul v. Sloan*, 2 Rob. (La.) 148;

Valle v. Cerre, 36 Mo. 575; *Ulster Co. Bank v. McFarlan*, 3 Denio, 553; *First Nat. Bank v. Clark*, 61 Md. 400; *Kennedy v. Geddes*, 3 Ala. 581; *Ulster Co. Bank v. McFarlan*, 5 Hill, 433. And see *Bell v. Moss*, 5 Whart. 189.

¹² *Ilsley v. Jones*, 12 Gray, 260.

¹³ See notes 4 and 5, *ante*, and *Lonsdale v. Lafayette Bank*, 18 Ohio, 126.

¹⁴ See the cases cited in the three notes preceding.

¹⁵ *Coolidge v. Payson*, 2 Wheat. 66; *Lanusse v. Barker*, 3 Wheat. 101; *Schimmelspenich v. Bayard*, 1 Pet.

The same statement may be made of an authority to draw a bill or bills, if the bill be in conformity with the letter.¹⁶ It is a good acceptance under a statute requiring a writing,¹⁷ and may be declared upon as an acceptance at common law.¹⁸ An exception that has little reason in it is made in some cases, that if the draft is payable after sight the promise or authority is not an acceptance, because it presupposes presentment and sight as a condition.¹⁹ The exception is trivial and valueless.²⁰ To insist upon such a promise as an acceptance, it is said that it should appear that the bill was taken for a valuable consideration.²¹

§ 216. Sufficiency of authority or promise.—The existence of the promise or authority will be a matter to be proven by evidence and inference from circumstances,¹ and may be proven by any competent evidence, such as an admission of the party² or by correspondence.³ If the promise or authority is in writing it constitutes the sole evidence, and the person acting upon it will not be affected by any arrangement or equities or understanding between the drawee

264; *Townsley v. Sumrall*, 2 Pet. 170; *Boyce v. Edwards*, 4 Pet. 111; *Kennedy v. Geddes*, 8 Port. 263; *Storer v. Logan*, 9 Mass. 55; *Greele v. Parker*, 5 Wend. 414. The letter may be pleaded as an acceptance (*Ontario Bank v. Worthington*, 12 Wend. 593); so of an authority to draw against shipments (*Burke v. Utah Nat. Bank*, 47 Neb. 247); but the authority is conditional upon the shipment. *Germania Nat. Bank v. Tooke*, 101 N. Y. 442.

¹⁶ *Mayhew v. Prince*, 11 Mass. 55; *Vance v. Ward*, 2 Dana, 95; *Beach v. State Bank*, 2 Ind. 498.

¹⁷ *Ulster Co. Bank v. McFarlan*, 5 Hill, 432; *O'Donnel v. Smith*, 2 E. D. Smith, 124.

¹⁸ *Ontario Bank v. Worthington*, 12 Wend. 593. But see note 11, *ante*.

¹⁹ *Wildes v. Savage*, 1 Story, 22; *Brown v. Ambler*, 66 Md. 391.

²⁰ See cases to notes 8 and 9, § 217, *post*, which do not seem to recognize the distinction.

²¹ *Woodard v. Commission Co.*, 43 Minn. 260. Practically the detriment to the holder, who acts upon the authority, is always a consideration. See *Carnegie v. Morrison*, 2 Met. 381, where no consideration seems to have existed.

¹ See the cases cited in next two notes.

² *Crumb v. Phettiplace*, 53 Ill. App. 337.

³ *Union Bank v. Shea*, 57 Minn. 180; *Berckhead v. Brown*, 5 Hill, 634.

and the drawer,⁴ unless such arrangements were known to the payee either from actual knowledge⁵ or through knowledge imputed to him from customary methods of business.⁶ In both the latter instances he will be bound by his knowledge. The construction of the writing determines the promise or authority. A written authority to draw⁷ or letter of credit⁸ is sufficient. A telegram in answer to one describing a certain check, which says: "T. is good, send on your paper," is sufficient.⁹ A telegram promising to pay a certain draft is an acceptance, both at common law¹⁰ and under the statute requiring a writing.¹¹ But a written statement that "we expect to take care of them and pay drafts as heretofore" is said to be not sufficient,¹² and though the writer says he will accept, the phrase may be controlled by other language in the letter.¹³ A letter agreeing to carry the maker of a promissory note is no authority to draw a draft for the amount of the note.¹⁴ A written promise to pay a bill when corrected is good as to the bill when corrected.¹⁵ If the authority to draw is countermanded, it cannot afterwards protect any one.¹⁶

⁴ Naglee v. Lyman, 14 Cal. 450; Carrollton Bank v. Tayleur, 16 La. 490.

⁵ See last case and Storer v. Logan, 9 Mass. 55.

⁶ Compare for the principle, First Nat. Bank v. Fiske, 133 Pa. 241.

⁷ Smith v. Ledyard, 49 Ala. 279; Pollock v. Helm, 54 Miss. 1; Adoue v. Fox, 30 Mo. App. 98 (under statute requiring writing); Rinz v. Renauld, 100 N. Y. 256; Gates v. Parker, 43 Me. 544; Michigan Bank v. Ely, 17 Wend. 508.

⁸ Monroe v. Pilkinton, 14 How. Pr. 250; Merch. Ex. Nat. Bank v. Cardago, 35 N. Y. Super. Ct. 162; Bussell v. Wiggin, 2 Story, 213. And see cases cited in note 11, *supra*.

⁹ North Atchison Bank v. Gar-

retson, 51 Fed. R. 168, 4 U. S. App. 557.

¹⁰ In re Armstrong, 41 Fed. R. 381.

¹¹ Molson's Bank v. Howard, 40 N. Y. Super. Ct. 15. And see, as to checks, § 150, *ante*.

¹² State Nat. Bank v. Young, 14 Fed. R. 889. This case is wrong. Any ordinary business man would have acted upon the letter. The court's remarks are simply foolish.

¹³ Musgrove v. Hudson, 2 Stew. (Ala.) 464.

¹⁴ Atlanta Nat. Bank v. Fertilizing Co., 83 Ga. 356. This decision is an egregious error. The letter was clearly sufficient.

¹⁵ Harrison v. Sternan, 4 Phila. 315.

¹⁶ First Nat. Bank v. Clark, 61 Md. 400.

§ 217. **Construction of the promise or authority.**—A promise to accept drafts drawn against shipments is necessarily conditional upon the shipment or bill of lading accompanying the draft;¹ but such a promise is an acceptance of drafts accompanied by bills of lading,² even though the bill of lading be not genuine, if that fact is not known to the payee.³ If the authority requires the bill of lading to be attached, it is sufficient that it be delivered with the draft though not actually attached.⁴ A promise to accept a bill cannot be construed to cover a bill for a debt not contemplated by the letter itself.⁵ Subsequent letters, however, may be construed in accordance with the terms of former letters.⁶ The word "draft" may include more than one draft.⁷ A letter authorizing a draft at so many days may be construed to cover a draft so many days after date as well as so many days after sight,⁸ but other cases hold that it means only so many days after sight.⁹ In such a case, evidence as to the meaning of the term ought to be admitted as controlling the meaning. The letter, when it contemplates a continuous drawing, makes a separate contract with each person that acts upon it.¹⁰ It is needless to say that the controlling authority is that any one to claim the benefit of such a letter, whether of authority or credit, or of promise to accept or to pay the draft, must have acted upon the letter,¹¹ and parted with a valuable consideration. And it should be remembered that, in the case of such promises, whether

¹ First Nat. Bank v. Bensley, 2 Fed. R. 609; Craig v. Marx, 65 Tex. 649. It is immaterial that the drawee who authorized actually received the goods, as these cases show. See § 220, note 14.

² Young v. Lehman, 63 Ala. 519.

³ Craig v. Libbett, 15 Pa. 238.

⁴ Foreman v. Walker, 4 La. Ann. 409. Compare Murdock v. Mills, 11 Met. 5.

⁵ Hodges v. Iowa Barb Wire Co., 80 Iowa, 65.

⁶ Berckhead v. Brown, 5 Hill, 634.

⁷ Hall v. First Nat. Bank, 35 Ill. App. 116.

⁸ Burnes v. Rowland, 40 Barb. 368; Barney v. Newcomb, 9 Cush. 46.

⁹ Ulster Co. Bank v. McFarlan, 5 Hill, 433, holds it means after sight not after date. Allentown Bank v. Kirmes, 4 Wkly. Notes Cas. 401, holds it to mean after date.

¹⁰ Union Bank v. Coster, 3 N. Y. 203.

¹¹ See § 215, *ante*, notes 4 and 5, and note 21 to the same section.

oral or written, emanating from banks, a bank has no power to lend its credit for accommodation, and such promises may be nugatory.¹² A promise of acceptance by more than one person is a joint and several promise as to each promisor.¹³

§ 218. Promise as to existing bill.—A promise to accept an existing bill is a collateral promise as to any one who has already taken the bill, and should be founded upon a new consideration.¹ To any one who upon the faith of the promise then takes the bill, the promise is original and not within the statute of frauds,² and if it intelligibly describes the bill is sufficient,³ under the limitation that it be acted upon within a reasonable time, as will be pointed out in the next section. A written promise to pay an existing bill is said to be an acceptance⁴ under all circumstances, but a promise to accept an existing bill or order for money, whether oral or written, unless founded upon some new consideration, would not seem to have any efficacy. But the rule is stated by the highest authority generally that a promise to accept a bill, whether oral or written, is an acceptance, and no qualification is placed upon the rule whatever.⁵ It seems to be good if in writing,⁶ and certainly would be good if not in writing, provided the promisor was under any obligation to accept the bill, arising from the possession of funds or of the proceeds of the property represented by the bill, or of

¹² See § 146, *ante*.

¹³ *Michigan State Bank v. Pecks*, 28 Vt. 200.

¹ *Barnett v. Boone Lumber Co.*, 43 W. Va. 441, so holds as to a verbal promise to accept. *Strohecker v. Cohen*, 1 Spears, 349, holds all verbal promises to accept binding as to bills of exchange.

² *Kelley v. Greenough*, 9 Wash. 659; *Townsend v. Sumrall*, 2 Pet. 170.

³ See note 15 to § 215, *ante*.

⁴ *Jones v. Iowa Bank*, 34 Ill. 313. See notes 5 and 6 to § 215, *ante*, and

Cook v. Miltenberger, 23 La. Ann. 377. *Contra* thereto, *First Nat. Bank v. Clark*, 61 Md. 400.

⁵ *Scudder v. Union Nat. Bank*, 91 U. S. 406, citing a number of cases, some of which are in point, to wit: the Illinois cases, and *Spaulding v. Andrews*, 48 Pa. 411.

⁶ It would not be within the statute of frauds, but the objection would still remain that it had no consideration. See the cases in note 4, *supra*.

something obtained by the proceeds.⁷ Sometimes a statute requires the promise to be made before the drawing of the bill.⁸

§ 219. Reasonable time for acting upon promise or authority.—As has been already stated, the promise or the authority must be acted upon within a reasonable time.¹ The failure to act upon the authority for two years has been held to be an unreasonable delay;² but a delay of fifteen days has been considered reasonable where no injury to the promisor was shown.³ What is a reasonable time must depend wholly upon circumstances, and the customs of the particular business must be taken into account.⁴ But a delay in getting a corrected draft was not unreasonable where the promisor was notified of the fact and made no reply.⁵

§ 220. Conformity of bill to promise or authority.—Promises to accept drafts or orders are considered somewhat in the light of contracts of guaranty, and the promise or the authority must be strictly followed.¹ Any material departure from the terms of the authority or promise cannot be enforced against the promisor.² A draft larger than the one authorized or promised to be accepted will be a material departure.³ A draft authorized to be drawn in a particular partnership name is not fulfilled by a draft in another

⁷ See § 214, *ante*, and *Barnett v. Boone Lumber Co.*, 43 W. Va. 441.

⁸ *La. Nat. Bank v. Schuchhardt*, 15 Hun, 405. The bill if altered in any way is newly issued from that time, if alteration was suggested by the drawee.

¹ *Wilson v. Clements*, 3 Mass. 1; *Lanusse v. Barker*, 10 Johns. 312; *Posey v. Denver Nat. Bank*, 7 Colo. App. 108.

² *Wilson v. Clements*, 3 Mass. 1; *Lanusse v. Barker*, 10 Johns. 312; reversed; 3 Wheat. 101. See the next note for case stating the general principle.

³ *Nimocks v. Woodey*, 97 N. C. 1.

⁴ *First Nat. Bank v. Fiske*, 133 Pa. 241.

⁵ *Johnson v. Clark*, 39 N. Y. 216.

¹ *Sherwin v. Brigham*, 39 Ohio St. 137; *Saulsbury v. Blandy*, 53 Ga. 665; *Lienow v. Pitcairn*, Fed. Cas. No. 8341. Compare *Coffman v. Clarinda Bank*, 33 Ill. App. 641.

² See the cases in the preceding note.

³ *Brinkman v. Hunter*, 73 Mo. 172. The promise is not good as a partial acceptance.

name, though the same partnership used that other name interchangeably with the one authorized.⁴ A draft drawn upon one of three drawees will not conform to an authority authorizing a draft upon the three.⁵ With such strictness is the rule held as to names. A general authority to draw, or a general promise to pay, drafts will be confined to drafts drawn upon the promisor at his place of business.⁶ Exchange added to a draft will destroy the efficacy of the draft where exchange was not authorized;⁷ but the addition of exchange to a draft which could not draw exchange will be an immaterial departure.⁸ If consignments are required to accompany the drafts and do not, the draft will not conform to the authority, although the drawee received the consignments;⁹ but this ruling seems exceedingly strained, and the court seems to have had its sense of justice poorly developed. But the better rule is that a reasonable compliance is all that is required, as instances cited in the note below¹⁰ show. If no place is named where the draft should be drawn, the drawer is confined to no particular place.¹¹ A stipulation that bills of lading be attached is satisfied by delivering the bill of lading with the draft,¹² or, if the attached bill of lading is forged, but that fact is unknown to the payee, the payee may enforce the promise.¹³ If the drawee retains the proceeds of the shipment, with notice of the violation of the authority, he will be bound.¹⁴

⁴First Nat. Bank v. Bensley, 2 Fed. R. 609.

⁵Glover v. Tuck, 1 Hill, 66.

⁶Michigan State Bank v. Leavenworth, 28 Vt. 209.

⁷Lindley v. First Nat. Bank, 76 Iowa, 629.

⁸North Atchison Bank v. Garretson, 51 Fed. R. 168.

⁹First Nat. Bank v. Bensley, 2 Fed. R. 609. See note 14, *infra*.

¹⁰North Atchison Bank v. Garretson, 51 Fed. R. 168; Kennedy v.

Geddes, 3 Ala. 581; Lathrop v. Harlow, 23 Mo. 209.

¹¹Posey v. Denver Nat. Bank, 7 Colo. App. 108.

¹²Foreman v. Walker, 4 La. Ann. 409.

¹³Craig v. Sibbett, 15 Pa. 238.

¹⁴Lewis v. Kramer, 3 Md. 265. If the drawee got the proceeds of the draft, no acceptance at all was necessary. Barney v. Worthington, 37 N. Y. 112; Merchants' Bank v. Griswold, 9 Hun, 561. See § 222, note 8.

§ 221. **Revocation of authority or promise.**—The authority may be considered as revoked by a failure to act upon it within a reasonable time, or by a failure to conform to the terms of the authority. It may be considered revoked by a refusal to act upon it and the proposal of other terms not accepted by the drawee,¹ as well as by a statement of the person authorized to both drawee and payee that he would not act upon the authority.² The authority when once acted upon to the extent of the power granted is exhausted,³ and the authority may be revoked whether the payee knows that fact or not.⁴ He takes the risk of the power being no longer in existence, just as he does when an authority is granted by a telegram, but another telegram has been sent revoking the authority, and he takes the draft in ignorance of the revocation.⁵ But a continuing authority exists until notice of revocation to the person authorized.⁶ The authority may be revoked at any time, as in the case of a permission to overdraw.⁷ But where the continuous authority has been addressed to a particular person to grant credit to the drawer, it would seem that in justice the revocation ought to be addressed to that person.

§ 222. **Defenses to promise to accept.**—The situation of the accounts between the drawer and drawee,¹ or an abuse of the confidence of the drawee,² or a failure on the part of the drawer to carry out his contract with the drawee,³ or a

¹ There was never any acceptance of the offer by the offeree.

² *Lienow v. Pitcairn*, 2 Paine, C. C. 517.

³ *Ranger v. Sargent*, 36 Tex. 26.

⁴ See the case cited in the next note and *Michigan State Bank v. Leavenworth*, 28 Vt. 209. But compare *Ilsey v. Jones*, 12 Gray, 260.

⁵ *First Nat. Bank v. Clark*, 61 Md. 400.

⁶ *De Tastell v. Cronsillat*, 2 Wash. C. C. 132; *Hall v. First Nat. Bank*,

133 Ill. 234. Death revokes the authority. *Michigan State Bank v. Leavenworth*, 28 Vt. 209.

⁷ *Ballard v. Fuller*, 32 Barb. 68. It may be revoked as a promise to accept, except as to some one who has acted upon it. *Robbins v. Lambeth*, 2 Rob. (La.) 304.

¹ *Palmer v. Rice*, 36 Neb. 844.

² *Gray v. Kentucky Bank*, 29 Pa. 365.

³ *Central Sav. Bank v. Richards*, 109 Mass. 413.

closing of the accounts between the drawer and drawee,⁴ or any other dealings between the drawer and the promisor,⁵ will not affect the person who has acted upon the authority in conformity with it, unless the fact is known to the payee and is of such a character that he is able to infer that the authority would no longer continue, or such that his acting upon the authority would be a fraud upon the promisor.⁶ Nor will a delay in presenting the draft for acceptance be a defense for the promisor where the holder parted with value,⁷ unless his conduct amount to an estoppel; nor can he defend on the ground of delay where the drafts are drawn against the proceeds of shipments which he has received.⁸ The defenses of failure to act upon the power or promise within a reasonable time, of revocation of the authority, and of failure to conform to the authority granted, have already been considered in the preceding sections.⁹

§ 223. Revocation of acceptance made.—An acceptance once made in writing cannot be revoked after delivery of the acceptance to the holder, unless the holder was in some way a party to an imposition upon the acceptor.¹ It would seem to follow that any other kind of acceptance recognized as valid in the particular jurisdiction could not be revoked; but it has been held that a promise to accept a draft made to the holder of the draft could be revoked where no third person was affected.² There is reason in holding that a

⁴ *Miltenberger v. Cooke*, 18 Wall. 421. Drawee knew draft was drawn.

⁵ *Carrollton Bank v. Tayleur*, 16 La. 490.

⁶ See *Sherwin v. Brigham*, 1 Cleve. Law R. 22, 39 Ohio St. 137.

⁷ *Starr v. Murchison*, 1 City Ct. R. 413. The acceptance becomes a promissory note.

⁸ *Miltenberger v. Cooke*, 18 Wall. 421.

⁹ See § 221, *ante*, and §§ 219 and 220, *ante*.

¹ *Fort Dearborn Nat. Bank v. Car-*

ter, Rice & Co., 153 Mass. 34; *Andressen v. First Nat. Bank*, 2 Fed. R. 122. It cannot be revoked as to the drawer by an agreement between the payee and acceptor to revoke it. *Trent Tile Co. v. Fort Dearborn Nat. Bank*, 54 N. J. Law, 33, 599.

² *Robbins v. Lambeth*, 2 Rob. (La.) 304. A promise to accept may be considered as an offer. This offer is made to any one who chooses to act upon it. Until it is acted upon it is no more than an offer and may

promise to accept, made before the draft is drawn, could be revoked at any time before the promise is acted upon, for such a promise is nothing more than a letter of credit, which gains no efficacy until acted upon. This is as far as the rule should go. A uniform rule ought to be applied to all valid acceptances, whatever their nature, and an acceptance once complete ought to be revocable only for fraud³ or mistake. A mistake as to the signature of the drawer, or as to the possession of funds, ought to be excepted from the right of revocation, because the drawee is bound to know the signature of the drawer and the state of the accounts. As to a *bona fide* transferee after acceptance, or as to a *bona fide* acceptee who has altered his position on the strength of the acceptance, the acceptance as well as the promise to accept before or after the drawing of the bill must be considered irrevocable.⁴ This statement presupposes that the bill is a genuine bill, not forged as to an indorser's name or as to the amount.

§ 224. **Necessity of acceptance as to drawee.**—Until a bill of exchange is accepted by the drawee, no obligation to pay it as a party to the bill exists upon the drawee's part,¹ unless the acceptor waives acceptance, which he may do by parol;² nor if the bill of exchange is drawn generally, and is not payable out of a particular fund, can it be considered; nor can it operate as an assignment of any funds of the drawer in the hands of the drawee.³ The rule in regard to checks has

be withdrawn. If it be withdrawn, a person acting upon it, as we have seen in the last section, must take the risk of the authority being still in existence.

³ *New York Stock Bank v. Gibson*, 5 Duer, 574. This must be the fraud of the holder.

⁴ As to checks, see § 150, *ante*.

¹ *Dickey v. Harmon*, 1 Cranch, C. C. 201; *Colorado Bank v. Boettcher*, 5 Colo. 185; *Reilly v. Daly*, 159 Pa. 605; *Northumberland Bank*

v. McMichael, 106 Pa. 460; *Kimball v. Donald*, 20 Mo. 597; *Hankin v. Squires*, 5 Biss. 186.

² *Wintermute v. Post*, 24 N. J. Law, 420, *semble*. Promises to accept may be considered as waivers also; so may authority to draw.

³ *Kimball v. Donald*, 20 Mo. 597; *Mo. Pac. Ry. Co. v. Wright*, 38 Mo. App. 141; *Brill v. Tuttle*, 81 N. Y. 457; *Holbrook v. Payne*, 151 Mass. 383; *Bush v. Foote*, 58 Miss. 5; *Marysville Bank v. Brewing Co.* 50

been heretofore stated and need not be repeated here.⁴ The same is true of an order drawn generally and not payable out of a particular fund.⁵ The exceptions to the above statement are (1) in the case of checks which have been treated by the parties and are understood between them to be assignments of a particular fund or a portion thereof, they will be considered as total from a legal, or partial assignments from an equitable, point of view;⁶ and this rule would be applied to drafts; (2) orders or bills of exchange, so called, payable out of a particular fund, or describing the fund out of which they are payable, will be considered assignments of the fund *pro tanto*,⁷ with the proviso that if they take a part of the fund only they are partial assignments, not good at law but in equity;⁸ (3) a promise to accept on the part of the drawer, or, as we have seen, previous authority to draw the draft or a letter of credit, may dispense with the necessity for accept-

Ohio St. 151; Hopkins v. Beebe, 26 Pa. 85; Randolph v. Canby, Fed. Cas. 11,559; Winter v. Drury, 5 N. Y. 525. Even where the draft is for the exact amount of the fund it is not an assignment. Shand v. Du Buisson, L. R. 18 Eq. 283; Bush v. Foote, 58 Miss. 5. *Contra*, Wheatley v. Strobe, 12 Cal. 97. (See Cushman v. Harrison, 90 Cal. 297.) Nimocks v. Woodey, 97 N. C. 1. The designation of the fund or particular account for reimbursement does not make the bill of exchange an assignment. Whitney v. Eliot Nat. Bank, 137 Mass. 354; Schmittler v. Simon, 101 N. Y. 554.

⁴ See § 146, *ante*, notes 15, 16, 17, and § 147, *ante*.

⁵ Shaver v. West. Union Tel. Co., 57 N. Y. 459; Woodruff v. Hensel, 5 Colo. App. 103. Order out of particular fund. Indiana Mfg. Co. v. Porter, 75 Ind. 428.

⁶ See § 146, *ante*, note 17, and Throop Grain Co. v. Smith, 110 N. Y.

83 (a draft). The case of North v. Campbell, 72 Ill. 380, has a misleading head-note. The decision really holds, however, that a draft drawn generally was an assignment of the fund prepared to meet it. The case should have been decided on the ground that the draft was drawn by an agent against the principal, who was in fact drawee, and the draft was accepted by the manner in which it was drawn.

⁷ Such orders are not bills of exchange, they are assignments. See § 207, *ante*. Implied acceptances might be classed under this head as assignments. See Hall v. First Nat. Bank, 133 Ill. 234; Milling v. Sloan, 57 Ga. 392; Cowperthwaite v. Sheffield, 1 Sandf. 416; Lowery v. Steward, 25 N. Y. 239; Miltenberger v. Attwood, 18 How. Pr. 330. But see Exchange Bank v. Rice, 107 Mass. 37.

⁸ Gurnee v. Hatton, 63 Hun, 197; Hopkins v. Nash Co., 77 N. W. R. 53.

ance;⁹ (4) there are some peculiar cases where the transaction amounts to the creation of a trust,¹⁰ or it may be an implied acceptance,¹¹ or what may be termed an estoppel.¹² Thus it has been held that where one man induced another to draw a bill in which the second man had no interest, the bill being drawn against funds prepared by the first man to meet the draft, and the latter induced the payee not to present the draft and then appropriated the fund for other purposes, the draft would be considered as having been accepted by the drawee as agent of the person who caused the draft to be drawn, and the latter would be held to have appropriated the money of the payee and as liable for money had and received;¹³ (5) though the drawee may be dead, his personal representative may accept the bill or order both before and after maturity;¹⁴ (6) the acceptance may be waived,¹⁵ either because the document is considered as accepted or by express waiver. But if the bill or check or order be not accepted the payee has his recourse upon the drawer or indorsers, and every one responsible to him upon the document, provided he protect his rights as hereinafter stated,¹⁶ or if he has seasonably protected his rights may sue the drawer upon his original claim.¹⁷ But if the drawer drew as agent the agent is not personally responsible,¹⁸ except for the truth of his implied representation of his authority as agent.¹⁹ In a peculiar case the holder was refused a remedy against the drawer or one whom he had the right to consider the drawer.²⁰

⁹ See §§ 215 to 222, *ante*.

¹⁰ See *Halsey v. Warden*, 25 Kan. 128; *Michigan State Bank v. Gardner*, 15 Gray, 362.

¹¹ See § 214, *ante*, and note 7, *supra*, and *Halsey v. Warden*, 25 Kan. 128. But see *Calhoun v. Manuf. Bank*, 36 Ga. 410, and *Ware v. Macon City Bank*, 59 Ga. 840.

¹² See § 214, *ante*.

¹³ *North v. Campbell*, 72 Ill. 380. See for an explanation of this case note 6, *supra*.

¹⁴ This must be in writing under the statute of frauds. See *Debesse v. Napier*, 1 McCord, 106.

¹⁵ See §§ 208 and 209, *ante*.

¹⁶ See *Brown v. Jackson*, 1 Wash. C. C. 512, for a non-negotiable order, and see § 225, *post*, note 2.

¹⁷ See § 225, *post*.

¹⁸ *Hall v. Conk*, 17 S. W. R. 1022.

¹⁹ This would not be a suit on the paper, but for damages.

²⁰ *Parsons v. Armor*, 3 Pet. 413. This decision is undoubtedly wrong.

§ 225. **Effect of non-acceptance.**— If acceptance of a bill of exchange be refused, whether it should be protested or not depends at common law on whether it is an inland or a foreign bill. This subject will be discussed under a later section.¹ Statutes may require protest or dispense with it. But at any rate notice of non-acceptance must be immediately given to the drawer and indorsers or they will escape liability,² unless the notice be excused for some of the reasons hereinbefore stated.³ This notice must be given by a party to the bill or by his agent.⁴ It cannot be given by a stranger.⁵ It will not avail to excuse the failure to give notice of non-acceptance that the bill was one which did not require acceptance. Notice must nevertheless be given.⁶ So a conditional acceptance must be notified to the drawer and indorsers.⁷ And if notice of non-acceptance be not given when acceptance is refused, a subsequent acceptance will not restore the holder's rights against the drawer and indorsers.⁸ Acceptance, of course, proves a due presentation,⁹ unless it be an acceptance after a refusal to accept. The foregoing rule as to the necessity of notice to drawer is not held with the same strictness as to checks, although a refusal to accept a check is a refusal to pay it, as we shall herein-

¹ See § 246, *post*.

² *Glasgow v. Copeland*, 8 Mo. 268; *Lindenberger v. Wilson*, 1 Cranch, C. C. 340; *Phillips v. McCurdy*, 1 Harr. & J. 187; *Warder v. Tucker*, 7 Mass. 449; *Stanton v. Blossom*, 14 Mass. 116. Notice must be of the first dishonor. *Thompson v. Cummings*, 2 Leigh, 321. This is true though the bill did not need presentation for acceptance. *Pendleton v. Knickerbocker Life Ins. Co.*, 5 Fed. R. 238; *Landrum v. Trowbridge*, 2 Met. (Ky.) 281; *Carmichael v. Pennsylvania Bank*, 4 How. (Miss.) 567. But this rule was ignored in *House v. Adams*, 48 Pa. 261.

³ See § 208, *ante*, and § 241, *post*.

⁴ *Chanoine v. Fowler*, 3 Wend. 173.

⁵ See last case cited.

⁶ See note 2, *supra*, and *Mitchell v. Degrand*, 1 Mason, 176.

⁷ *Scattergood v. Finley*, 20 Ga. 423. The opinion in this case is a curious and absurd performance by Lumpkin, J. The ground of the court's decision is foolish. The true ground is the one given above in the text. If the notice be given of the qualified acceptance, the prior parties are held as a matter of necessity. *Rowe v. Young*, 2 Bligh, 391.

⁸ *Mitchell v. Degrand*, 1 Mason, 176.

⁹ *Edson v. Fuller*, 22 N. H. 183.

after see.¹⁰ As to non-negotiable orders the rule will be hereinafter stated in connection with refusal of payment.¹¹

§ 226. **Effect of acceptance.**—The absolute acceptance of the draft or order renders the acceptor the principal debtor upon the instrument¹ and obligates the acceptor to pay the amount according to the tenor and effect of the instrument, or, if the acceptance is special, according to the tenor of the acceptance.² The presence or absence of funds in the acceptor's hands is immaterial.³ An absolute acceptance cannot be shown to be conditional,⁴ nor can it be shown as against the holder that it was modified by agreement between the drawer and drawee.⁵ It includes a stipulation for attorney's fees in the bill.⁶ But a mistake as to the amount between the drawer and the drawee may be set up where the drawer is the holder;⁷ while an agreement between the holder and drawer not to press the acceptor is not available to the acceptor.⁸ Nor can the acceptor set up that the drawer was incompetent to contract,⁹ nor that he signed the bill not with his true name.¹⁰ The acceptance is in effect the acceptor's promissory note to the holder,¹¹ the drawer becomes *prima facie* a secondary debtor to the acceptor,¹² and

¹⁰ See § 237, *post*.

¹¹ See § 269, *post*.

¹ *Parmalee v. Williams*, 72 Ga. 42; *Diversey v. Moor*, 22 Ill. 331; *Blair v. Tennessee Bank*, 11 Humph. 84; *Capital City Ins. Co. v. Quinn*, 73 Ala. 558.

² *Cox v. National Bank*, 100 U. S. 712; *Swope v. Ross*, 40 Pa. 186.

³ See next section, and *Raborg v. Peyton*, 2 Wheat. 385. An accepted order drawn on its face against certain funds is enforceable in equity against funds in the drawee's hands. *Michigan State Bank v. Gardner*, 15 Gray, 362.

⁴ *Haines v. Nance*, 52 Ill. App. 406; *Heavener v. Donnell*, 7 Smedes & M. 244; *Cowan v. Hallock*, 9 Colo.

572. Nor can a written acceptance be varied by parol. *Mason v. Graff*, 35 Pa. 448.

⁵ *Fisher v. Beckwith*, 19 Vt. 31; *Flournoy v. First Nat. Bank*, 79 Ga. 810.

⁶ *Smith v. Muncie Nat. Bank*, 29 Ind. 158.

⁷ *Thomas v. Thomas*, 7 Wis. 476.

⁸ *Van Alstyne v. Sorley*, 32 Tex. 518.

⁹ *Cowlon v. Meckersham*, 54 Pa. 302, *dictum*.

¹⁰ *Clafin v. Griffin*, 8 Bosw. 689.

¹¹ *Sylvester v. Staples*, 44 Me. 496; *McKirdy v. Hare*, 7 Atl. R. 172.

¹² *North Am. Coal Co. v. Dyett*, 7 Paige, 9.

the acceptor and drawer are *prima facie* principal debtors as to the indorsers.¹³ Though the acceptor be a mere accommodation acceptor to the knowledge of the holder he is none the less bound.¹⁴ The holder, it has been said, may strike out the drawer's name after acceptance.¹⁵ Yet as between the acceptor and the drawer the acceptor may show himself to be a surety, just as he or the drawer may show the same fact as to an indorser as against that indorser.¹⁶ Non-negotiable orders accepted absolutely ought to be binding upon the acceptor though he have no funds of the drawer.¹⁷ A payee upon such an order, or an indorsee to whom the acceptance was given, may at common law maintain an action upon the acceptance in his own name,¹⁸ but it is said an indorsee after acceptance of a non-negotiable order cannot.¹⁹ But this rule would have no application where an assignee or the real party in interest can sue.

§ 227. Admissions by acceptance.—The acceptance of the drawee is, nothing further appearing, an admission that the drawee has funds of the drawer to the amount of the bill.¹ As to the holder this presumption from the admission

¹³ *Diversey v. Moor*, 22 Ill. 331.

¹⁴ *In re Babcock*, 3 Story, 393; *Wilson v. Isbell*, 45 Ala. 142; *Anderson v. Anderson*, 4 Dana, 352; *Cronise v. Kellogg*, 20 Ill. 11; *Nowak v. Excelsior Stone Co.*, 78 Ill. 307.

¹⁵ *Ashton v. Reeves*, 3 Phila. 339. This does not affect the rights of the acceptor as against the drawer, but the drawer is never responsible to the acceptor in the capacity of acceptor. The case of *Canadian Bank v. Coumbe*, 47 Mich. 358, without any apparent reflection holds that if the holder knows the drawer to be a surety he must act accordingly, but the cases in the preceding note expressly rule the

contrary. See also *Bradford v. Hubbard*, 8 Pick. 155.

¹⁶ *Canadian Bank v. Coumbe*, 47 Mich. 358; *Child v. Eureka Powder Works*, 44 N. H. 354.

¹⁷ *Greene v. Duncan*, 37 S. C. 239; but see *Richardson v. Carpenter*, 46 N. Y. 660, and *Kemble v. Lull*, 3 McLean, 272, which says the acceptance of an order conditional upon the presence of funds is an admission of funds.

¹⁸ *Bacon v. Bates*, 53 Vt. 30; *Grant v. Wood*, 12 Gray, 220.

¹⁹ *Gerard v. La Coste*, 1 Dall. 194.

¹ *Gillilan v. Myers*, 31 Ill. 525; *Raborg v. Peyton*, 2 Wheat. 385. The same is true of an order. See note 17 to last section.

is absolute.² And as between the acceptor and drawer and indorsers, the natural presumption from the drawing of a bill of exchange or order for money is that the drawee is indebted to the drawer,³ and if the bill or order is accepted the presumption is that the drawee or acceptor has funds of the drawer,⁴ and if the bill or order is paid the inference is that it was paid by the drawee or acceptor out of his indebtedness to the drawer.⁵ But as between the drawer and acceptor and indorsers the fact may be shown to rebut the presumption,⁶ and thus it may be made to appear that the acceptor was in fact an accommodation acceptor as to the drawer⁷ or as to an indorser, or that the drawer was an accommodation drawer for an indorser, or that one indorser was an accommodation indorser as to another indorser.⁸

The acceptance of a bill or order admits the genuineness of the signature of the drawer, but it does not admit the genuineness of any other signature upon the bill or of the contents of the instrument.⁹ The rule as to the acceptance or payment of checks is the same.¹⁰ If the bill be payable to the drawer's own order the rule is the same.¹¹ Hence if the acceptor pays to an innocent indorsee the bill upon a forged indorsement he will be liable to the true owner of the bill,¹² and he may compel the person to whom he paid to

² See note 1 to last section.

³ *Bradley v. McClellan*, 3 Yerg. 301; *Adams v. Darby*, 28 Mo. 162; *Alvord v. Baker*, 9 Wend. 323.

⁴ *Byrd v. Bertrand*, 7 Ark. 321; *Parks v. Nichols*, 20 Bradw. 143; *Byrne v. Schwing*, 6 B. Mon. 199; *First Nat. Bank v. Moss*, 41 La. Ann. 227.

⁵ *Healy v. Gilman*, 1 Bosw. 235; and see the cases in the last note.

⁶ *Alvord v. Baker*, 9 Wend. 323.

⁷ *Trego v. Lowry*, 8 Neb. 238; *Thurman v. Van Brunt*, 19 Barb. 409.

⁸ See note 16 to last section.

⁹ *White v. Continental Nat.*

Bank, 64 N. Y. 316; *First Nat. Bank v. Ricker*, 71 Ill. 439; and see § 154, *ante*, as to forgeries in checks. But a bank is bound to know whether its own bills have been fraudulently raised. *United States Bank v. Bank of Georgia*, 10 Wheat. 333. In this case Story, J., does not seem to understand that there is a difference between alteration of the amount and forgery of the bank's signature.

¹⁰ See § 154, *ante*.

¹¹ *Williams v. Drexel*, 14 Md. 566.

¹² *Dick v. Leverich*, 11 La. 573; *Jackson v. Commercial Bank*, 2 Rob. (La.) 128.

repay the amount to him; but otherwise, if he pay to the lawful holder of the bill, he cannot compel repayment unless the holder was a party to some fraud or was guilty of negligence amounting to fraud.¹³ The same rule applies to the acceptor *supra protest*.¹⁴ But it is conceivable that the acceptor of the bill may mislead a person by his acceptance. Suppose a bill were presented to the drawee, and the drawee had within his knowledge an easy means of ascertaining the forgery of an indorser's name or an alteration in the amount of the bill, and should still negligently accept the bill, and upon the strength of the acceptance some third party, a bank, for example, should without negligence take the bill for value, would the acceptor be liable to such party, or if he paid such party would he be estopped from claiming the money back? A court of high authority has held that if the acceptor is a bank it would be held for its negligence, and there is no reason why the rule should not be applied to any other acceptor.¹⁵

§ 228. Liabilities and rights of acceptor.— Since, as we have seen, the acceptor becomes the principal debtor, the presumption is that the acceptor had funds of the drawer,¹ and if the accepted bill be protested for non-payment the drawer may recover from the acceptor without showing payment of the bill,² or without showing title under the payee;³ yet other courts hold that the drawer must show, in order to recover from the acceptor, that he was compelled to pay the bill on account of the acceptor's default.⁴ If the

¹³ Bank of Commerce v. Union Bank, 3 N. Y. 230; Ellis v. Ohio Life Ins. Co., 1 Handy, 119.

¹⁴ Goddard v. Merchants' Bank, 4 N. Y. 147.

¹⁵ See § 154, *ante*.

¹ See note 1 to last section.

² Kingman v. Hotaling, 25 Wend. 423. *Contra*, Quinn v. Hanley, 5 Bradw. 51; Pilkington v. Woods, 10 Ind. 432, *semble*.

³ Cooper v. Jones, 79 Ga. 379; Kingman v. Hotaling, 25 Wend. 423; Zebbley v. Voisin, 7 Pa. 527; Coursin v. Leadlie, 31 Pa. 506 (non-negotiable order). But of course if it appear that it was an accommodation acceptance the drawer must show that he put the drawee in funds. Parker v. Lewis, 39 Tex. 394.

⁴ See last two cases in note 2, *supra*.

acceptor, however, was an accommodation acceptor, in order to recover from him the drawer must show that he put the acceptor in funds.⁵ And an accommodation acceptor is entitled in equity to be subrogated to the position of the holder of the bill.⁶ As we have said, the fact that the acceptor is an accommodation acceptor does not vary his responsibility to the holder,⁷ whether the holder knew he was an accommodation acceptor or not,⁸ and whether the holder took by indorsement before⁹ or after acceptance.¹⁰ The fraudulent diversion of the bill itself is no defense in favor of the acceptor as against a *bona fide* holder whether he took the bill before or after acceptance;¹¹ nor is a diversion of the proceeds of goods against which the draft was drawn;¹² but it would be a defense in favor of the accommodation drawer as against the acceptor who had diverted the proceeds of the shipment which he had agreed to apply upon the bill.¹³ The acceptor, by his acceptance, obtains a lien upon the funds of

⁵ Parker v. Lewis, 39 Tex. 394.

⁶ Toronto Bank v. Hunter, 4 Bosw. 646.

⁷ See notes 14 and 15, § 226. An acceptance is good after maturity (Stockwell v. Bramble, 3 Ind. 428), and it is good after protest.

⁸ See notes 14 and 15, § 226, and First Nat. Bank v. Schuyler, 39 N. Y. Super. Ct. 440. The holder is under no obligation to realize on the drawer's securities. Fowler v. Gate City Nat. Bank, 88 Ga. 29. *Contra*, Bradford v. Hubbard, 8 Pick. 155.

⁹ Credit Co. v. Howe Machine Co., 54 Conn. 357; Arpin v. Owens, 140 Mass. 144; Huertematte v. Morris, 101 N. Y. 63.

¹⁰ An indorsee after acceptance takes the acceptance as the promissory note of the acceptor Mechanics' Bank v. Livingston, 33 Barb. 458.

¹¹ Fort Dearborn Nat. Bank v.

Carter, Rice & Co., 152 Mass. 34; Mechanics' Bank v. Livingston, 33 Barb. 458; Louisville Bank v. Ellery, 34 Barb. 630; Iselin v. Chemical Nat. Bank, 40 N. Y. Supp. 388. And see Gray v. Kentucky Bank, 29 Pa. 365, as to a diversion of proceeds of the draft. But indorsee before acceptance cannot enforce an *ultra vires* acceptance of a corporation, since he gave credit to drawer or indorser. Farmers' Bank v. Empire Stone Co., 5 Bosw. 275.

¹² Brander v. Phillips, 16 Pet. 121.

¹³ Brander v. Phillips, 16 Pet. 121. Accommodation indorsers may recover against prior accommodation acceptor, though the proceeds of the bill were applied to the payment of a claim upon which one of the accommodation indorsers was an indorser. Gillespie v. Campbell, 39 Fed. R. 724. See Leslie v. Bassett, 59 N. Y. Super. Ct. 403.

the drawer in his hands.¹⁴ He can charge a commission for accepting only by agreement or by a customary mode of dealing.¹⁵ The liability of the acceptor is for the face of the bill and interest,¹⁶ and, if protested, for the notarial fees;¹⁷ but he is not liable for damages unless made so liable by statute. The promise to accept a bill to be drawn would cover as damages for a breach the whole cost and expenses, including re-exchange and interest.¹⁸ An order payable in stocks accepted makes the acceptor liable, not for the amount of money named, but for the value of the stocks at the date they should have been delivered.¹⁹ The acceptor *supra protest* recovers from the drawer or the party for whom he accepts protest fees as part of the bill.

§ 229. Conditional and variant acceptances.—A conditional acceptance is an absolute acceptance of a conditional order or a conditional acceptance of an absolute order. Of the first sort are acceptances of orders payable out of a particular fund or if certain funds should be realized.¹ Such acceptances are impossible to arise upon bills of exchange, because such documents are not bills of exchange.² A conditional written acceptance of a bill of exchange must be one that is made so upon its face, because an absolute written acceptance cannot be shown to be conditional.³ But conditional written acceptances may be acceptances of a bill

¹⁴ *Lambert v. Jones*, 2 Pat. & H. 144. Lien by agreement, see *Coats v. Donnell*, 94 N. Y. 168; and for the lien of holders upon securities to secure acceptances, see *Kramer's Appeal*, 37 Pa. 71.

¹⁵ *Pratalongo v. Larco*, 47 Cal. 378; *Gibson v. Bailey*, 24 Miss. 237. See *Millaudon v. Arnaud*, 4 La. 542.

¹⁶ *Henrick v. Farmers' Bank*, 8 Port. 539; *Gibson v. Bailey*, 24 Miss. 237; *Van Arsdale v. Boardman*, 3 How. Pr. 60.

¹⁷ *Bowen v. Stoddard*, 10 Met. 375; *Manning v. Kohn*, 56 Ala. 235.

¹⁸ *Russell v. Wiggin*, 2 Story, 213.

¹⁹ *City Bank v. Gerard Bank*, 10 La. 562.

¹ See *Seymour v. Lumber Co.*, 58 Fed. R. 957, 16 U. S. App. 245.

² See § 242, *post*, and §§ 207 and 208, *ante*.

³ *Haines v. Nance*, 52 Ill. App. 406; *Cowan v. Hallock*, 9 Colo. 572; *Heavener v. Donnel*, 7 Smedes & M. 244. A conditional acceptance must be clearly expressed. *Coffman v. Campbell*, 87 Ill. 98.

to be drawn where the acceptance might be considered conditional, as we have heretofore seen.⁴ Oral acceptances may be conditional in the same ways as written acceptances are.⁵ If the acceptance is conditional, the holder's assent to it makes the acceptor liable upon the happening of the contingency named in the order.⁶ If that condition has already happened, the order and acceptance are absolute;⁷ but, if possible, a condition will be applied to things to happen in the future, not to matters which have already happened.⁸ Again, the acceptor cannot, by his own act, defeat the condition and thus destroy the effect of the order.⁹ The same rules are applied to acceptances of orders which are made conditional.¹⁰ They will be given a prospective operation,¹¹ and cannot be defeated by the act of the acceptor;¹² but otherwise the acceptor does not become liable until the contingency has happened,¹³ but when it has happened his liability is absolute.¹⁴ An offer of a conditional acceptance is a continuing one and may be acted upon until revoked.¹⁵ But a general acceptance of an order drawn on condition that the paper is presented at a certain time renders the ac-

⁴ See § 220, *ante*. The acceptance is conditional upon the bill conforming to the authority; but this use of language is not accurate. No acceptance ever existed.

⁵ See, for instance, *Phelps v. Northrup*, 56 Ill. 156, and *Hall v. Steel*, 68 Ill. 231, where the acceptance implied was conditional.

⁶ *Read v. Wilkinson*, 2 Wash. C. C. 514; *Ford v. Angebrodt*, 37 Mo. 50; *Rice v. Porter*, 16 N. J. Law, 440; *Tyler v. Stalk*, 103 Mich. 268; *Cummings v. Hummer*, 61 Ill. App. 393; *Henry v. Hazen*, 5 Ark. 401; *Walker v. Lide*, 1 Rich. Law, 249; *Riley v. Smith*, 64 N. Y. 576; *Keyes v. Follett*, 41 Ohio St. 535; *Gill v. Weller*, 52 Md. 8. See *Newhall v. Clark*, 3 Cush. 376.

⁷ *Brabazon v. Seymour*, 42 Conn. 551; *Phillips v. Frost*, 29 Me. 77.

⁸ *United States v. Metropolis Bank*, 15 Pet. 377.

⁹ *Herter v. Goss Co.*, 57 N. J. Law, 42; *Phelps v. Northrup*, 56 Ill. 156. The drawer cannot countermand after acceptance. *Northern Bank v. Leverich*, 8 Rob. (La.) 207.

¹⁰ Consult the cases in note 6, *supra*, and *Granmer v. Carrol*, 4 Cranch, C. C. 400.

¹¹ Consult the case in note 8, *supra*.

¹² See cases in note 9, *supra*.

¹³ See cases in note 6, *supra*, and *Marshall v. Clary*, 44 Ga. 511.

¹⁴ *Granmer v. Carrol*, 4 Cranch, C. C. 400.

¹⁵ *Wylie v. Brice*, 70 N. C. 422.

ceptor liable even if the paper be not presented at that time,¹⁶ and the same rule ought to apply to a conditional acceptance of a general order. Acceptances payable out of certain funds are conditional,¹⁷ but absolute when the fund is realized,¹⁸ and the acceptor cannot put it out of his own power to collect the fund.¹⁹ Acceptances according to the terms of a certain contract are conditional,²⁰ as are acceptances out of the proceeds of work to be done, or out of the proceeds of a certain contract, or out of the proceeds of certain goods to be sold.²¹ Conditional acceptances result where the acceptance is made conditional when in funds,²² and where an order is so accepted the holder cannot resort to the drawer until the drawee refuses to pay when in funds,²³ and the construction of funds is that the word means cash.²⁴ The drawee cannot defeat by his own act the realization of funds,²⁵ nor can the drawer countermand the order after acceptance.²⁶ The burden is upon the holder of the order to show the drawee's possession of funds when suing upon such an acceptance.²⁷ It must be noted that a conditional or variant acceptance, if not notified to prior parties on the bill, discharges those prior parties.²⁸ The acceptance must be made by the drawee or by his agent.²⁹ If accepted by

¹⁶ Gay v. Haseltine, 18 N. H. 530.

¹⁷ Flanagan v. Mitchell, 16 Daly, 223.

¹⁸ See last note.

¹⁹ Phelps v. Northrup, 56 Ill. 156.

²⁰ Haseltine v. Dunbar, 62 Wis. 162; but see Cowan v. Hallock, 9 Colo. 572; Keyes v. Follett, 41 Ohio St. 535.

²¹ See cases in last note and in note 6, *supra*.

²² See Campbell v. Pettingill, 7 Me. 126.

²³ See last case cited.

²⁴ Carlisle v. Hooks, 58 Tex. 420.

²⁵ See cases cited in note 19 and note 9, *supra*, and Keyes v. Follett, 41 Ohio St. 535.

²⁶ Northern Bank v. Leverich, 8 Rob. (La.) 207.

²⁷ Marshall v. Clary, 44 Ga. 511.

²⁸ See Rowe v. Young, 2 Bligh, 391; Walker v. State Bank, 13 Barb. 636. The rule would be the same as to paper not requiring acceptance, but acceptance refused on it. Thatcher v. Mills, 14 Tex. 13. A change of the city where payable is a variation that drawer and indorser must concur in. Niagara Bank v. Manufacturing Co., 31 Barb. 403.

²⁹ Heenan v. Nash, 8 Minn. 407. Unless it be *supra protest* or for honor. The acceptance by an agent is good when he accepts as agent and is authorized. Gillig v. Lake

any one else it is a variant acceptance, but that person will be liable according to his contract.³⁰ If one of several joint drawers accepts he binds himself,³¹ although the effect of such an acceptance upon the rights of drawer and indorsers would be to release them unless they assented. Like any other variant acceptance it is binding between the acceptor and the holder. The acceptance need not be dated.³² The presumption will be in favor of its having been made before maturity at a proper time.³³

§ 230. Discharge of parties to accepted bill.—A bill of exchange differs from a check¹ in this, among other things, that an absolute acceptance of it does not release the drawer or indorser; they remain liable secondarily to the acceptor. But in order to have this effect the acceptance must be an acceptance according to the tenor of the bill. It must be absolute, or if conditional it must be notified to prior parties.² If the prior parties acquiesce and do not object to such an acceptance they will be held to have assented thereto.³ If

Bigler Road Co., 2 Nev. 214. If he accepts personally he binds himself. *Lollerstedt v. Griffin*, 29 Ga. 708; *Nicholls v. Diamond*, 9 Exch. 154; *Taber v. Cannon*, 8 Met. 456. Compare *Walker v. State Bank*, 9 N. Y. 582. But it has been held that the agent accepting individually may show that the holder knew he was agent and was accepting as agent. *Bruce v. Lord*, 1 Hilt. 247. But see *Arnold v. Sprague*, 34 Vt. 402. But if a bill is drawn by a principal upon its officer as an individual, his acceptance in the name of his company is not an acceptance by the drawee. See *Walker v. Bank of State*, 13 Barb. 636.

³⁰ See *Markham v. Hazen*, 48 Ga. 570; *Rice v. Ragland*, 10 Humph. 545, and note preceding.

³¹ *Smith v. Milton*, 133 Mass. 369.

³² *Kenner v. Creditors*, 1 La. 120.

³³ *Roberts v. Bethell*, 12 C. B. 778. The acceptance may be made before the bill is drawn (*Hopps v. Savage*, 69 Md. 513), or before it is completed. *Pittsburgh Bank v. Neal*, 22 How. 97.

¹ See § 150, *ante*.

² *Rowe v. Young*, 2 Bligh, 391; *Scattergood v. Finley*, 20 Ga. 423. *semble*.

³ The holder has the right to insist upon an absolute acceptance. *Tuckerman v. Hartwell*, 3 Me. 153; *Green v. Raymond*, 9 Neb. 295. The making of the acceptance payable at a particular place of business is not a variation or a condition. *Troy City Bank v. Lauman*, 19 N. Y. 477; *Todd v. Kentucky Bank*, 3 Bush, 626; *Myers v. Standart*, 11 Ohio St.

the payment of the bill be postponed by the acceptance, the prior parties, if they do not assent thereto, will be released.⁴ This results from the general rule that the acceptor being the principal debtor and the prior parties sureties, any extension of time granted by the holder to the principal releases the sureties not assenting thereto.⁵ This rule is so universal that it is nothing less than astonishing to find the Supreme Court of Illinois solemnly asserting that an extension of time to the acceptor does not release the drawer.⁶ The release is no less effectual, it is said, though the extension of time be void;⁷ but the very same court has said that the drawer must have been injured in order to complain.⁸ But an extension of time to a drawer does not release the acceptor,⁹ even though the holder knows him to be an accommodation acceptor.¹⁰ Nor does a release to one indorser release prior parties on the paper,¹¹ even though the paper be made for the accommodation of that indorser.¹² But the

29. *Contra*, *Rowe v. Young*, 2 Bligh, 391.

⁴ *Burthe v. Donaldson*, 15 La. 382; and see next notes.

⁵ This is an extension of time to acceptor, and hence is a release to the drawer and indorsers. See *United States Bank v. Hatch*, 6 Pet. 250; *Ross v. Jones*, 22 Wall. 588; *Uniontown Bank v. Mackey*, 140 U. S. 220, for the principle. The acceptor being principal debtor cannot complain as to the holder's acts toward the drawer. *Fowler v. Gate City Nat. Bank*, 88 Ga. 29; *Wilson v. Isbell*, 45 Ala. 142; *Ash-ton v. Reeves*, 3 Phila. 339; *Diversey v. Moor*, 22 Ill. 331. But see *Bradford v. Hubbard*, 8 Pick. 155.

⁶ *Diversey v. Moor*, 22 Ill. 330. The opinion is by Breese, J. It is marvelous to notice the ponderous unconsciousness with which the learned judge perpetrates this start-

ling error. The statement is, however, absolute *dictum*.

⁷ *Parmalee v. Williams*, 72 Ga. 42. The general rule as to sureties is otherwise; but in this particular case, where notice of non-payment must be given, the void extension, if acted upon, is certainly a release, unless the other parties concur.

⁸ *High v. Cox*, 55 Ga. 662.

⁹ *Diversey v. Moor*, 22 Ill. 330; *Lambert v. Sanford*, 2 Blackf. 137. *Contra*, *Meggett v. Baum*, 57 Miss. 22.

¹⁰ This follows from the rule that the acceptor becomes principal debtor, which legal conclusion he is not at liberty to dispute. See note 12, *infra*, and note 5, *supra*.

¹¹ *Bank of Kentucky v. Floyd*, 4 Met. (Ky.) 159; *Sargent v. Appleton*, 6 Mass. 85.

¹² See *In re Babcock*, 2 Story, 393; *Wilson v. Isbell*, 45 Ala. 142; *Anders-*

better rule would be that the parties, except the acceptor, are to be considered principals or sureties upon the paper, according to the holder's knowledge of their relations, not according to the apparent fact shown by the paper. But an intentional release to one joint acceptor releases all the acceptors, unless there be a statute making a different rule.¹³

ARTICLE III.—DEMAND.

§ 231. Presentment for payment — What law governs.

Under the settled rules of law the presentation of commercial paper for payment, the demand of payment, and the notice of non-payment are governed by the law of that place where the paper is payable,¹ because the parties are supposed to have contracted with reference to the law of that place. The rule governing the form of the protest will be considered under another section.² A bill of exchange is payable where the drawee resides, nothing else appearing. If that residence is given in the bill, or if the bill states where it is payable, the declaration in the bill governs. If the residence is given at one place, and the payment of the bill is fixed for another, the rule would seem to be that the law of the latter place gov-

son v. Anderson, 4 Dana, 352. And see Ross v. Jones, 22 Wall. 576; Brown v. Williams, 4 Wend. 360; notes 5 and 10, *supra*.

¹³ This is the rule at common law. But an exception has been allowed arising from the intention of the parties. Elgin City Banking Co. v. Self, 35 S. W. R. 953 (Tex.); Merchants' Nat. Bank v. McAnulty, 31 S. W. R. 1091 (Tex.), and the cases referred to therein. But it has been held that if one of the joint parties is a surety and known to be such to the holder, a release to the principal releases him, even where the common-law rule does not prevail. Irvine v. Adams, 48 Wis. 468.

Compare Bonnell v. Prince, 32 S. W. R. 855 (Tex.).

¹ Wiseman v. Chiapella, 23 How. 368; Pierce v. Indseth, 106 U. S. 546; Wooley v. Lyon, 117 Ill. 244; Brown v. Jones, 125 Ind. 375; National Bank v. Wood, 142 Mass. 563; Spearman v. Ward, 114 Pa. 634; Todd v. Neal, 49 Ala. 266; Webster v. Howe Machine Co., 54 Conn. 394. And the case of Musson v. Lake, 4 How. 262, decides that presentment as to indorser is governed by the law of the place of indorsement. But a bill by one government on another is not governed by the law merchant. United States v. Bank of U. S., 5 How. 382.

² See § 305, *post*.

erns. If nothing appears as to the place of payment or the residence of the drawee, the law governing would be that of the place where the bill was properly presented. A promissory note, if it declares where it is payable, is governed by the law of that place. If no such declaration be made in it, its payment is governed by the law of the place where it is made negotiable,³ or, if no such declaration appears, where it is dated. If neither place appears in the note, the law of the place of contracting or making of the note governs.⁴ All the above rules are merely a method of ascertaining where the instrument is payable. The law of the place where payable governs both maker, or drawer, indorsers, and drawee or payee.⁵ There are variant decisions given below, but they are not authority.⁶ If the governing law is that of another jurisdiction it is to be proven as a fact.⁷ If no proof on the matter be offered, the presumption will be made either that the law of the foreign jurisdiction is the law of the forum⁸ or is the common law.⁹

§ 232. Acceptance *supra protest*.—In days when instantaneous communication by telegraph was not possible, an acceptance *supra protest* was of far more importance than it is to-day. If a bill were dishonored and the drawer could

³ *Gilman v. King*, 2 Cranch, C. C. 48.

⁴ This is the presumptive place of payment.

⁵ *Commercial Bank v. Barksdale*, 36 Mo. 563. And see cases in note 1, *supra*.

⁶ *Thorp v. Craig*, 10 Iowa, 461. The law of the place where draft drawn governs presentment and notice. But see *Chatam Bank v. Allison*, 15 Iowa, 357; *Belford v. Bangs*, 15 Bradw. 76. Notice to indorser must be according to the place of indorsement. But see *Woolley v. Lyon*, 117 Ill. 244; *Snow v. Perkins*, 2 Mich. 238; *Aymer v.*

Sheldon, 12 Wend. 439; *Musson v. Lake*, 4 How. 262; *Williams v. Putnam*, 14 N. H. 540. But see *Bank of Orange Co. v. Colby*, 12 N. H. 520; *Raymond v. Holmes*, 11 Tex. 54. Compare *Williams v. Wade*, 1 Met. 82. In this last case the note was probably payable where dated.

⁷ In absence of proof it will be assumed to be, according to some states, the common law, in others the law of the forum.

⁸ *Greenleaf on Evidence* (16th ed.), §§ 43, 486; 1 *Chitty on Bills* (13th Am. ed.), 344.

⁹ See last note.

be reached only by the slow process of the mails, an incalculable injury might be done to his credit should his bills be dishonored. The acceptance *supra protest* was and remains an acceptance made by some one not a party to the bill. It could be made only after the bill had been dishonored, and if protest were required only after protest. The usual form was for such acceptor to write upon the bill, "Accepted *supra protest* for the honor of" the person for whom it was accepted, or simply "Accepts s. p." The engagement of such acceptor is to pay if the drawee does not pay at maturity. The acceptance must be assented to by the holder, but need not be notified to the drawer and indorsers for their consent.¹ It would appear that since the acceptor *supra protest* can only accept after dishonor, an acceptance *supra protest* presupposes that notice of dishonor has already been given to the drawer and indorsers. Therefore the holder is not required to give notice of the acceptance *supra protest*; yet the acceptor *supra protest* should notify the person for whose honor he accepted. The acceptor *supra protest* should state for whom he accepts. If no statement be made, the presumption is that the acceptance is for the honor of the drawer. There may be several acceptances for honor in succession, and the engagement of each acceptor would be the same, but it would be several. Since the engagement of the acceptor *supra protest* is to pay the bill if the drawee does not, the bill must be presented upon maturity to the drawee, or the acceptor *supra protest* will be released as well as the drawer.² It is conceived that any extension given to the drawee without such acceptor's consent would release him. The acceptor *supra protest* pays for his principal, who is the person he accepts for. But such acceptor may make such

¹ See 1 Chitty on Bills (13th Am. ed.), 344.

² Williams v. Germaine, 7 B. & C. 468; Schofield v. Bayard, 3 Wend. 488. This last decision holds that such presentment for payment must be made as against the draw-

ers. The only reason that can be offered for such a ruling is that the holder has accepted the conditional engagement of the acceptor *supra protest*, and if he release him by negligence he had no right to recur to the drawers.

acceptance, though he does it under a guaranty from the drawee.³ If he pay, he should notify the drawer or person for whom he accepted,⁴ and he is entitled to recover the amount he paid and interest, and protest fees, if he paid them.⁵

§ 233. Presentment for payment of accepted or non-accepted bills.—A bill that has been accepted must none the less be presented for payment,¹ except as to the acceptor. There is an apparent exception, however, in the fact that an acceptance may be made payable at a particular bank or particular place and still remain a general acceptance. To answer the rule in such a case, it is sufficient, as to the other parties to the bill, that it be at such place for payment, or presented at such place for payment, upon its maturity. Such a presentation is, in fact, a proper demand.² But as to the other parties to the bill, the rules governing an accepted bill are the same as those governing a bill not requiring acceptance, but merely presentation for payment. A waiver of acceptance is a waiver of presentation for acceptance. It does not dispense with presentation and demand for payment.³ But as to the acceptor, his engagement, where he accepts, becomes absolute, for the acceptance is his promissory note. No demand is necessary as to him;⁴ it is his duty to look up the holder of the bill and pay it. But if he accepts payable at a particular place,

³ *Konig v. Bayard*, 1 Pet. 250.

⁴ *Konig v. Bayard*, 1 Pet. 250; *Gazzam v. Armstrong*, 3 Dana, 554; *Wood v. Pugh*, 7 Ohio, 488.

⁵ *City Bank v. Girard Bank*, 10 La. 562.

¹ This is necessary in order to fix the liability of the drawer and indorsers. *Allain v. Lazarus*, 14 La. 327; *James v. Ocoee Bank*, 2 Cold. 59.

² *Tuckerman v. Hartwell*, 3 Me. 147; *Wing v. Beach*, 31 Ill. App. 78. The same result follows on the ac-

ceptance of a bill, where the bill is payable at a particular place. *Green v. Goings*, 7 Barb. 652; *Tuckerman v. Hartwell*, 3 Me. 147; *Brooks v. Higby*, 11 Hun, 235. If the place is fixed, the demand must be made there. *Brown v. Jones*, 113 Ind. 46.

³ *Webb v. Mears*, 45 Pa. 222.

⁴ *Hunt v. Johnson*, 96 Ala. 130; *Jackson v. Packer*, 13 Conn. 342; *Blair v. Bank of Tennessee*, 11 Humph. 84; *Plato v. Reynolds*, 27 N. Y. 586; *Fall River Bank v. Wil-lard*, 5 Met. 220.

and he is at the place ready to pay the bill upon the maturity of it, his readiness would relieve him from the payment of interest thereafter.⁵ But in no event does the holder lose the amount of the bill as against the acceptor by a failure to present the bill to him for payment.⁶ In the case of accepted checks the rule is that an accepted check which has been accepted to the holder after delivery releases the drawer, and by necessity releases the indorsers, since they are secondarily liable to the drawer.⁷ But a check accepted by the bank to the drawer does not release the drawer.⁸ Such an accepted check, therefore, should be treated as an ordinary check, and if the holder of the check presents it within a reasonable time, and, if it be not paid, gives notice thereof, the indorser will be held liable; the drawer, even if it be not presented within a reasonable time, will be exonerated only to the extent of his injury.⁹

Where a bill of exchange requiring presentation for acceptance is presented for acceptance, and acceptance is refused, and the liability of the parties thereon fixed, no presentation for payment is required;¹⁰ the bill has been dishonored. If the holder presents the bill for acceptance, and leaves it with the drawee for acceptance, he need make no second demand either for acceptance or for payment,¹¹ although the rule would be otherwise if he agreed to present the bill again.¹² If the bill be one not requiring presentation, and the holder nevertheless presents it for acceptance, we have seen that, if acceptance is refused, he must notify the prior parties.¹³

⁵ See § 233, *post*, as to promissory note, and *Freeman v. Curran*, 1 Minn. 169.

⁶ See last note.

⁷ See § 150, *ante*.

⁸ See § 150, *ante*.

⁹ In *re Brown*, 2 Story, 502. See *Thompson v. British North Amer. Bank*, 45 N. Y. Super. Ct. 1.

¹⁰ *Lenox v. Cook*, 8 Mass. 460; *Mason v. Franklin Bank*, 3 Johns. 202; *Wild v. Passamaquoddy Bank*,

3 Mason, 505 (as to indorser); *Wallace v. Agry*, 4 Mason, 336; *Lucas v. Ladew*, 28 Mo. 342. The foregoing are cases of drafts requiring acceptance. But *Exeter Bank v. Gordon*, 8 N. H. 66; *Plato v. Reynolds*, 27 N. Y. 586, and perhaps *Picquet v. Mayer*, 14 La. 74, are as to bills not requiring acceptance.

¹¹ *Allen v. Kramer*, 2 Bradw. 205.

¹² *Case v. Burt*, 15 Mich. 82.

¹³ See § 237, *post*.

Whether the bill could then be treated as a dishonored bill is very questionable, for the engagement of the drawer on a bill not requiring presentation is that the drawee will pay, not that he will accept; and hence it ought to be the rule that, if the instrument is one that requires no presentation for payment, to so present it, if the drawer or some prior party has not taken it up prior to maturity; but the decided cases are to the contrary, as the last note indicates. Where a check is presented for acceptance and acceptance refused, the check is at once dishonored, and notice should be given; and since refusal of acceptance of a check is refusal of payment, no further demand is necessary. The rule would not seem to be otherwise in those states which recognize the check as an assignment upon presentation to the bank.¹⁴

§ 234. Parties entitled to require demand of payment. The various kinds of instruments that this question may arise in regard to are bills of exchange, checks, promissory notes and non-negotiable orders. The parties to bills of exchange entitled to demand of payment are the drawer and indorser and acceptor *supra protest*. Guarantors hold a peculiar position. Parties for whose accommodation the bill is drawn will require special examination. The parties to checks who are entitled are the drawer and indorser, though the result of a failure to demand as to the drawer requires a different rule than the one applied to such party to a bill of exchange. The indorser of a promissory note stands in a different position from the maker of the note, but in the same position as the indorser of a bill. Guarantors

¹⁴ The theory of these cases is (see § 147, *ante*) that the presentation, and the presence of funds, transfers so much of the drawee's account to the payee of the check. Strictly, then, it would result from this theory that the drawer, having transferred so much money to the payee, had paid the check. But those states which hold the rule

treat a check as an ordinary demand bill, so far as notice to the drawer and so far as demand as to the drawer is required, hence the statement in the text is correct. See *Lester v. Given*, 8 Bush, 357. But the very fact that such is the case shows the absolute fallacy that underlies the rule.

of the note are governed by the same rule as guarantors of bills of exchange. Parties to non-negotiable orders do not fall under the same classification as parties to negotiable instruments. There is considerable difference of opinion as to indorsers of certificates of deposit. The order in which the various parties will be considered is: first, the drawer and indorser of bills of exchange; second, accommodation drawer and indorser of bills of exchange and parties for whose accommodation the bill was drawn; third, drawer and indorser of checks; fourth, maker of note; fifth, indorser of note; sixth, accommodation parties to note; seventh, guarantors of bills or notes; eighth, parties to non-negotiable orders; ninth, indorser of certificates of deposit. It should be remembered that certain bills of exchange do not require presentment as to the drawer because they are considered the promissory notes of the drawer.¹ The indorser upon such paper is in the position that an indorser upon a promissory note would be under the same circumstances.

§ 235. Drawer and indorser of bill.—The drawer or indorser of a bill of exchange contracts that he will pay the amount of the bill, if the bill be duly presented by the holder for acceptance (if it requires it) and for payment, and if due notice of non-payment is given to him. Presentment for acceptance has already been considered. But presentment and demand of payment of a bill not already dishonored must be shown preliminarily to fixing the liability of the drawer or indorser upon the bill.¹ The rule is constantly stated in connection with notice of non-payment, for both are necessary; and as a general rule notice without demand, and demand without notice, are equally futile. Unless the demand be waived or unless it be excused or rendered unnecessary by some of the facts that appear in the following sections, the drawer and indorser will be released upon the bill.² The fact

¹ See § 208, *ante*.

74; *Winter v. Cox*, 41 Ala. 207; *Mo-*

¹ *French v. Bank of Columbia*, 4 Nabb v. Tally, 27 La. Ann. 640.

Cranch, 141; *Wallace v. Agry*, 4
Mason, 336; *Thayer v. Peck*, 84 Ill.

² See the cases in the preceding
note.

that the drawer or indorser has not been injured by the failure to demand is immaterial, since the demand is a condition precedent to his absolute liability.³ The failure to make the demand is equivalent to a payment of the bill by the drawer in the sense that the original demand or claim for which the draft was given either as payment or as provisional payment will be discharged to the extent of the draft,⁴ or if it has been taken as security the drawer or indorser so transferring will be entitled to a credit upon the debt secured to the amount of the bill, just as if the paper were given in payment.⁵ Even paper that has been indorsed after protest requires a demand as to an indorser after protest for the reason that it is a new bill payable upon demand.⁶

§ 236. Accommodation parties to bills.—The word “accommodation” presupposes two persons,—one who accommodates and another who is accommodated. An accommodation drawer, that is to say, one who lends his name for accommodation, and the accommodation indorser, who is a regular indorser, are entitled to have a demand of payment made upon the drawee.¹ But the above statement is con-

³Slack v. Longshaw, 8 Ky. Law R. 166.

⁴Dayton v. Trull, 23 Wend. 345. And see next note.

⁵Brown v. Cronise, 21 Cal. 387; Adams v. Boyd, 33 Ark. 33; Carrol v. Sweet, 30 N. Y. Supp. 204; Farwell v. Curtis, 7 Biss. 160; Shriner v. Kelly, 25 Pa. 61; Shipman v. Cook, 16 N. J. Eq. 251; Jennison v. Parker, 7 Mich. 355; Moore v. Brungard, 6 Miss. 557; Foote v. Brown, 2 McLean, 369; Blanchard v. Boom Co., 40 Mich. 566. As to want of notice, see Murphy v. Phelps, 12 Mont. 531; Stam v. Kerr, 31 Miss. 199. But see as to paper taken as security, In re Brown, 2 Story, 502; Westphal v. Ludlow, 6 Fed. R. 348; Griffith v. Grogan, 13 Cal. 317;

Boardman v. Steele, 13 Conn. 547; Van Wart v. Smith, 1 Wend. 219; Gallagher v. Roberts, 2 Wash. C. C. 191.

⁶Cox v. Jones, 2 Cranch, C. C. 370; Stewart v. French, 2 Cranch, C. C. 300; Levy v. Drew, 14 Ark. 334; Colt v. Bernard, 18 Pick. 260; Tyler v. Young, 30 Pa. 143; Shelby v. Judd, 24 Kan. 161; Hunt v. Wadleigh, 26 Me. 271. *Contra*, French v. Jarvis, 29 Conn. 347; Hall v. Monohan, 6 Iowa, 216.

¹French v. Bank of Columbia, 4 Cranch, 141; Buck v. Cotton, 2 Conn. 126; Perry v. Green, 19 N. J. Law, 61; Sawyer v. Brownell, 13 R. L. 141; Bogg v. Keil, 1 Mo. 743; Braley v. Buchanan, 21 Kan. 274; Rea v. Dorrance, 18 Me. 137; Barry

fined to regular indorsers, that is to say, indorsers who indorse upon their own transfer of the paper. But there are also irregular indorsers, that is to say, indorsers who indorse the paper without transferring it, and, as will appear a little later in this section, such indorsers are governed by varying rules. If the paper were drawn for the accommodation of the drawer, he is not entitled to claim a demand,² although one court says that an acceptance for accommodation of the drawer simply devolves upon the drawer the burden of showing that he furnished funds before maturity, if he claim to be entitled to notice.³ Such an acceptance cannot be called an accommodation acceptance. If the paper is drawn for the accommodation of the regular indorser, who shares in the consideration, he is not entitled to claim that a demand should be made.⁴ If the drawer is an accommodation drawer as to the indorser, and does not share in the consideration, he probably would be held to be entitled to have demand made and notice given to him of non-payment.

v. Friend, 87 Ark. 437. The greater part of these cases is in regard to notes, not bills of exchange. *Sherley v. Fellowes*, 9 Port. 300; *Taylor v. Bank of Illinois*, 7 T. B. Mon. 576; *Todd v. Edwards*, 7 Bush, 89; *Susquehanna Valley Bank v. Loomis*, 85 N. Y. 207, an irregular indorser, and this case is governed by the peculiar rule in New York as to irregular indorsers. It states, however, the general rule as to accommodation indorsers. But this rule should only apply to a drawer who accommodates the drawee, and to accommodation indorsers. A case contrary to the well-settled rule is *Hull v. Myer*, 90 Ga. 674, where the directors of a corporation were indorsers on the corporation's note. The court solemnly announces: "Good sense, good morality and good law are one and the same so

long as they are not sundered violently by legislation or ignorantly by judicial error," and then proceeds to perpetrate some violent sundering on its own account. The inference of ignorance is irresistible.

² *Evans v. Norris*, 1 Ala. 511; *Ross v. Bedell*, 5 Duer, 462; *McLaren v. Marine Bank*, 52 Ga. 131; *Barbaroux v. Waters*, 3 Met. (Ky.) 304.

³ *Nicolet v. Gloyd*, 18 La. 417; *Lacoste v. Harper*, 3 La. Ann. 385. But *New Orleans Sav. Bank v. Harper*, 12 Rob. (La.) 231, seems *contra*.

⁴ *Reid v. Morrison*, 2 Watts & S. 401; *Bank of Washington v. Way*, 2 Cranch, C. C. 149; *Martel v. Tureaud*, 6 Mart. (N. S.) 118. *Farmers' Bank v. Van Meter*, 4 Rand. 553, applies the rule to an indorser who knew that the drawer was being accommodated.

So it would probably be as to a regular indorser who did not share in the consideration, but lent his name for the accommodation of a subsequent indorser. The accommodation acceptor, however, is not entitled to have a demand made on the drawer.⁵

Turning now to the case of irregular indorsers, that is to say, indorsers who indorse the paper without being either indorsee or payee thereof, which indorsement may be made before the paper is delivered or after the paper is delivered, the rules of law differ in different jurisdictions. If such an indorser shared in the consideration, or was the party for whose benefit the paper was drawn, he ought not, under the rule before stated, to be permitted to claim that a demand should be made or notice given to him in any jurisdiction. If he be not interested in the paper beyond merely lending his name, the courts differ as to his rights and liabilities. In some jurisdictions the question is controlled by a statute, and the statute, of course, would govern. But in nearly all the states such an indorsement may be explained by parol, and the actual meaning of the indorsement may be shown. This ruling was no doubt produced by the varying constructions given to such an indorsement, and is an instance contrary to the general rule that does not permit a written contract to be varied by parol. That actual contract would govern as to the rights of the parties, even as to a *bona fide* holder who had no notice of the agreement, since the indorsement is ambiguous. If the holder had notice, either actual or constructive, he would necessarily be bound by the agreement. But nothing more than the fact of the irregular or anomalous indorsement appearing, the United States courts and the majority of the state courts hold that such an indorser is an original promisor. This must mean, as to the holder, an original promisor with the person, drawer or indorser, for whom, or to give credit to whom, he signed. If that person was entitled on the bill to claim demand and notice, he ought to be entitled; but the language of the

⁵ Cox v. Mechanics' Sav. Bank, 28 Ga. 529.

courts is confined to cases on notes and does not warrant this statement. He ought not to be governed by the same rule as the anomalous indorser of a note, and is entitled to have a demand made or notice given.⁶ This matter will rarely be of importance, since the question of authority or right to draw will usually control. In other jurisdictions, as in Illinois, he is a guarantor; and no contract other than the writing being shown, he is not entitled to have demand.⁷ In other jurisdictions, such as New York and Wisconsin, and under statutes, he is a first or second indorser, as circumstances may determine, and hence is entitled as an accommodation indorser.⁸ This subject will be examined in section 241, *post*.

§ 237. Drawer and indorser of checks.—A check being payable upon demand, the drawer, if he had funds in the bank, and the indorser are entitled to have demand of payment made within a reasonable time; such is the law.¹ But the consequences of a failure to demand payment of the check within a reasonable time are not the same as those which attend the failure to demand payment of a bill payable on demand, so far as the drawer is concerned. Courts have recognized in the case of bank checks that the ordinarily prudent man will assume that a bank is solvent, and that there is no pressing necessity for prompt action; but the controlling consideration has been, no doubt, that the drawer

⁶ For the rule as to notes, see *Good v. Martin*, 95 U. S. 90; *Bendey v. Townsend*, 109 U. S. 665; *Phipps v. Harding*, 70 Fed. R. 468, 34 U. S. App. 148. The federal courts disregard the state courts' holdings and enforce the general rule. *Contra*, *Hooks v. Anderson*, 58 Ala. 238; *Jones v. Goodwin*, 39 Cal. 493; *Fessenden v. Summers*, 62 Cal. 484; *De Pauw v. Bank of Salem*, 126 Ind. 553.

⁷ Strictly the rule ought to be that he is a guarantor for the

drawer and not for the drawee, and hence is entitled to demand and notice of non-payment to the drawer; but the cases seem to speak of anomalous indorsers of negotiable paper. See § 240, *post*.

⁸ See cases in note 6, *supra*, cited from California, Indiana and Alabama.

¹ *Daniels v. Kyle*, 5 Ga. 245; *Smith v. Janes*, 20 Wend. 192; *Sherman v. Comstock*, 2 McLean, 19; *Minturn v. Fisher*, 4 Cal. 35; *Harker v. Anderson*, 21 Wend. 372.

of the check is not injured in any way by the failure to present the check, except in case of the bank's failure. Therefore the rule is that as to the drawer of a check he can only complain of a failure to present the check to the bank to the extent that he has been actually injured;² but as to the indorser of a check the rule is the same as that which applies to the indorser of a bill of exchange. He is entitled to have a presentment of the check for payment made within a reasonable time after its delivery after his indorsement.³

Accommodation drawers of checks are governed by the same rule as the ordinary drawer of a check. They can complain of a delay in presentation only if they are injured thereby.⁴ A mere accommodation drawer, who has not received value, would seem to be in the same position of any other drawer of a check.⁵ But an indorser or drawer who has received value for his check or for his indorsement would seem to be in the position of the ordinary drawer of a check.⁶ If the check is given for the accommodation of an indorser upon it, the proper rule to apply to such an indorser does not seem to have received judicial examination.⁷ It is needless to say that, until a demand has been made, no suit can

²Gough v. Staats, 13 Wend. 549. The cases upon this point are very numerous. There is no contradictory authority. Of course the holder of the check cannot sue the drawer until he has presented the check. But Breese, J., says in *Springfield Fire Ins. Co. v. Tincher*, 30 Ill. 399, that he understands the rule differently, and as usual he understands the matter wrongly.

³Veazie Bank v. Winn, 40 Me. 60; Gough v. Staats, 13 Wend. 549.

⁴Diener v. Brown, 1 McArthur, 350. This question is rarely of importance, because, unless a demand is excused, no suit can be brought on the check, and then the question is whether the drawer is injured by delay.

⁵He would be an accommodation drawer of a bill under the same circumstances, and unless demand was excused for some reason, he could not be held without a demand, and, if the bank failed, the question would be upon the time of demand.

⁶He could only claim exoneration where he had been injured by the delay. Where the bank had failed, or some other injury had been suffered by the drawer, he would be released. But a mere accommodation indorser of a check before delivery is governed by the rule stated in § 236, *ante*, as to the anomalous indorser of a bill.

⁷He would be discharged where the drawer would be discharged.

be maintained against the drawer or indorser. Hence the question upon checks is always whether the demand was in time. The giving of a check in payment of a claim pays the claim where the drawer is released, just as in the case of a bill or note.⁸

§ 238. Maker of note or acceptor of bill.—The maker of a promissory note stands in the same position as the acceptor of a bill of exchange. A failure to demand payment of the note does not prejudice him in any way. His engagement is to pay the note, and only payment will relieve him. A failure to demand payment from him or from an acceptor, except one *supra protest*, will not discharge the note¹ or acceptance unless it was *supra protest*, nor prevent suit being brought upon it.² The suit itself becomes a demand. A valid tender will prevent the running of interest against him from the date of the tender to the date of a demand. Again, if the note be payable at a particular place, or the acceptance be payable at a particular place, and the maker or acceptor be present there, or a deposit be present there at the maturity of the note or bill, and the note be not there,³ or the holder be not there prepared to receive payment,⁴ the

⁸ See notes 4 and 5, § 235, *ante*.

¹ Wallace v. McConnel, 13 Pet. 136, and many other cases. The same rule applies to a note payable at a particular place. Dockray v. Dunn, 37 Me. 442; Carter v. Smith, 9 Cush. 321; Nichols v. Pool, 47 N. C. 23. The maker, by a tender at the place, stops interest. See notes 3 and 4, *infra*. If the maker is indorser, he has been held not entitled to notice. Schmidt v. Archer, 113 Ind. 365. But if demand is required to make the note draw interest, as a demand note without interest, a demand is necessary if interest is desired. Scovil v. Scovil, 45 Barb. 517. Coupons for interest need not be demanded. Williams-

port Gas Co. v. Pinkerton, 95 Pa. 62; City of Nashville v. First Nat. Bank, 1 Baxt. 402. But attorney's fees provided for in note in order to be recovered require a demand upon the maker. See Prescott v. Grady, 91 Cal. 518; Lindley v. Ross, 137 Pa. 629. But this ought to be true only as to a demand note. The maker, if the place of payment is not fixed, must look up the holder and pay the note so far as he himself is concerned. Gale v. Corey, 112 Ind. 39.

² See note 4, § 233, *ante*.

³ Nichols v. Pool, 47 N. C. 23.

⁴ Mulherrin v. Hannum, 2 Yerg. 81; Montgomery v. Tutt, 11 Cal. 307; Pryor v. Wright, 14 Ark. 189;

maker or acceptor will be relieved from interest until a demand be made upon him,⁵ when interest will again run.

§ 239. Indorser of note.—The regular indorser of a negotiable promissory note is entitled to have a demand of payment made upon the maker by the holder at the date of the legal maturity of the note, whatever that may be,¹ unless such a demand is excused or waived. Unlike certain bills of exchange, which, if put into circulation, may not require presentment for acceptance until after their maturity,² a promissory note must be presented for payment as to the indorser at the date of its maturity.³ If due at a certain time, its maturity may be determined from inspection. If due upon demand, its maturity must be determined by circumstances or by the statute;⁴ but it seems plain that each successive indorsement is equivalent to a new demand note, and as each prior indorser is responsible to each subsequent indorser, the question of the propriety of the time of demand must be determined solely with reference to the date of the last indorsement, unless such a time has elapsed between two indorsements as to have relieved the prior of the two indorsers, which fact would have necessarily released all

Yeaton v. Berney, 62 Ill. 61; Budweiser Brewing Co. v. Capparelli, 38 N. Y. Supp. 972. But where the maker of the note, payable at his factor's office, provided funds by settling with his factor, and there was no demand at maturity, and the factor failed, the maker of the note was held released. Charleston Banking Ass'n v. Zorn, 14 S. C. 444 (wrong because factor was maker's agent).

⁵ Mahan v. Waters, 60 Mo. 167. The subsequent demand must not include interest not due on account of the tender made.

¹ Farmers' Bank v. Small, 2 T. B. Mon. 88. This is true as to an in-

dorser before maturity. See note 6 for indorsers after maturity.

² See § 251, *post*.

³ See note 1 to § 236, *ante*. House v. Vinton Nat. Bank, 43 Ohio St. 346; Magruder v. Union Bank, 3 Pet. 87. The same rule is held as to an assignor. Ruddell v. Walker, 7 Ark. 457; Aldes v. Johnson, 1 Vt. 136. Statutes may affect this question. See Frosh v. Holmes, 8 Tex. 29. *Contra* to the text is Hull v. Myers, 90 Ga. 674.

⁴ The general rule is that a demand note is due within a reasonable time, but statutes place the apparent maturity in various instances from two weeks to six months.

indorsers prior to the one actually released.⁵ Indorsers after maturity are entitled to the same demand as drawers of demand bills of exchange.⁶

§ 240. **Accommodation parties to notes.**—The accommodation maker of a promissory note, though known to be such to the holder, is nevertheless responsible as maker to the holder.¹ He certainly cannot claim any demand upon the party whom he accommodated.² The accommodation indorser, if he be a regular indorser of a note, is of course entitled to have a demand made upon the maker.³ But an indorser for whose accommodation a note was made is the real maker, and if he received the benefit of the note he is not entitled to have a demand made upon the maker.⁴ An indorser for whose accommodation a bill is made really stands in a different position from an indorser for whose ac-

⁵ The last indorser indorsed an overdue note, and if the demand was good as to him he is held. He can hold any preceding indorser not discharged, and since, as we shall see, any party to the paper, who is subsequent to the person to whom the notice is given, may give notice, the question becomes merely one of notice.

⁶ A note indorsed overdue becomes a note or bill payable upon demand, and, as will later appear, must be presented within a reasonable time for payment. But there is some authority *contra*. See *French v. Jarvis*, 29 Conn. 347; *Hall v. Monohan*, 6 Iowa, 216.

¹ *Bank of Montgomery v. Walker*, 9 S. & R. 229 (here the holder was ignorant of the fact); *Marion Nat. Bank v. Phillips*, 35 S. W. R. 910; *Hansborough v. Gray*, 3 Grat. 356 (here the holder knew the fact). *Contra*, *Connerly v. Planters' Ins. Co.*, 66 Ala. 432. See *Hays v. North-*

western Nat. Bank, 9 Grat. 127. The same rule would apply as to makers who were accommodation makers for another maker.

² See last note.

³ *French v. Bank of Columbia*, 4 Cranch, 141; *Braley v. Buchanan*, 21 Kan. 274; *Rea v. Dorrance*, 18 Me. 137; *Bogg v. Keil*, 1 Mo. 743; *Perry v. Friend*, 57 Ark. 437; *Buck v. Cotton*, 2 Conn. 126; *Perry v. Green*, 19 N. J. Law, 61; *Sawyer v. Brownell*, 13 R. I. 141. The rule as to an irregular indorser is a different matter.

⁴ It makes no difference whether this indorsement is before or after delivery, or is regular or anomalous. *Bank of Washington v. Way*, 2 Cranch, C. C. 149; *Thornton v. Stoddert*, 1 Cranch, C. C. 534; *Martel v. Tureaud*, 6 Mart. (N. S.) 118; *Blenderman v. Price*, 50 N. J. Law, 296; *Holman v. Whiting*, 19 Ala. 703; *Torrey v. Foss*, 40 Me. 74; *First Nat. Bank v. Ryerson*, 23 Iowa, 503.

accommodation a note is drawn. It is true the one is really the drawer of the bill, and the other is really the maker of the note. But the drawer of the bill ordinarily has the right to have a demand of payment made, while the maker of a note has not. Therefore the rule is strictly logical that the indorser for whose accommodation a note is made, and who receives the benefit, is not entitled to claim that demand of payment should be made upon the ostensible maker. An accommodation indorser of a note after maturity is simply the accommodation indorser of a note payable upon demand, and should be governed by the same rule. The case of irregular indorsers of promissory notes varies with the rule of law held as to his liability, as will appear in the next section.⁵

§ 241. Guarantors of bills or notes.—A guaranty of a negotiable instrument may result from an actual contract of guaranty upon the bill or in a separate written agreement,¹ or may result from the relation of a party to the bill. The actual contract of indorsement upon the bill itself may either be written upon the bill or may be provable by parol. Thus, if the indorser writes or signs upon the bill a guaranty,² or such words as “holden for the within,” or words of similar import,³ he becomes a guarantor. But a blank in-

⁵ In those jurisdictions which hold the anomalous indorser to be an original promisor, he is a maker, and therefore no demand is necessary as to him. *Rey v. Simpson*, 22 How. 341; *Good v. Martin*, 95 U. S. 90. See the note, Book 16, p. 260 (Law. ed.), Sup. Ct. U. S. Reports. The actual contract may, however, be shown. In other jurisdictions he is held to be a guarantor, and therefore subject to the rule in the next section, and subject to the rule that the actual contract may be shown. In other states he is a second indorser, liable to be made a first indorser by evidence, and

therefore is entitled to notice. For the authorities upon the rule, see 1 Daniel on Neg. Inst., §§ 707 to 714, and see the next section, notes 14 to 20.

¹ *Duval v. Farmers' Bank*, 9 Gill & J. 44.

² *Furber v. Caverly*, 42 N. H. 74; *Burt v. Parish*, 9 Ala. 211.

³ *Blanchard v. Wood*, 26 Me. 358; *Bayley v. Hazard*, 3 Yerg. 487; *Tatum v. Bowner*, 27 Miss. 760; *Baker v. Kelly*, 41 Miss. 696; *Furber v. Caverly*, 42 N. H. 74 (“accountable”). *Contra*, *Vance v. Collins*, 6 Cal. 435.

dorsement if irregular, but not if regular, may by parol be shown to be a guaranty, and if the agreement at the time of the blank irregular indorsement was for a guaranty by the indorser, the indorsee may write the guaranty above the indorsement,⁴ but not unless such was the agreement.⁵ A transfer of the bill by delivery without indorsement may be shown to be a guaranty by parol, and certainly, if the parol agreement of guaranty was made at the date of delivery and receipt of value for the note, such an agreement would have a consideration to support it, and would not be within the statute of frauds.⁷ The guaranty may also arise from the relation of the party to the paper. Thus the drawer of a bill for whose accommodation the acceptor accepts may be considered a guarantor,⁸ and an indorser of a bill for whose accommodation the drawer acts may be considered a guarantor.⁹ Likewise an indorser who is interested in the original consideration for the bill and receives it, or a part of it, may be considered a drawer or a joint drawer and, under some circumstances, equally a guarantor.¹⁰ The indorser of a note for whose accommodation the note is made, or who is interested in the consideration, or who receives the consideration or a part of it, may be considered a maker, or joint maker, or a guarantor.¹¹ Likewise irregular or anomalous indorsers

⁴ Beckwith v. Angell, 6 Conn. 315. But as to a regular indorser. Rodney v. Wilson, 67 Mo. 123; Beeler v. Frost, 70 Mo. 185; Barnard v. Galin, 23 Minn. 192; Barry v. Morse, 3 N. H. 132; Bank of Albion v. Smith, 27 Barb. 489; Schmitz v. Hawkeye Co., 8 S. D. 544. The rule does not apply to irregular indorsers. Their waiver may be shown by parol. See notes 14 to 20, *infra*.

⁵ Farmer v. Rand, 14 Me. 225; Edwards v. Shields, 7 Bradw. 70; Beckwith v. Angell, 6 Conn. 315. For an assignment of a non-negotiable instrument, see Josselyn v. Ames, 3 Mass. 274.

⁶ Edwards v. Shields, 7 Bradw. 70; Catlin v. Jones, 1 Pin. 130; Kimbro v. Lamb, 4 Humph. 94; Hill v. Martin, 12 Mart. (O. S.) 177. The last cases are where a waiver was written above a blank indorsement. The two things practically amount to the same agreement.

⁷ See King v. Summit, 73 Ind. 312; Evans v. Stuhrberg, 78 Mich. 145; Milks v. Rich, 80 N. Y. 269.

⁸ See § 236, *ante*.

⁹ See § 236, *ante*.

¹⁰ See § 236, *ante*.

¹¹ See § 240, *ante*.

who indorse a note before delivery, certainly if interested in the consideration,¹² and by the weight of authority regardless of their interest,¹³ will be considered guarantors of the note. But there is other authority holding that such an indorser is merely an ordinary indorser.¹⁴ The weight of authority is that the real contract of the parties upon such an indorsement may be shown by parol.¹⁵ In some states parol proof may be adduced to rebut the presumption of guaranty arising from such an indorsement,¹⁶ but this rule is denied in other jurisdictions.¹⁷ And in those jurisdictions which consider such an indorser to be an ordinary indorser a contract of guaranty may be shown by parol;¹⁸ but other authority disputes this proposition.¹⁹ In other states it is held that the presumption of guaranty cannot be denied by parol as against a *bona fide* holder.²⁰ But however the guaranty may arise, whether it be made by a party to the paper in connection with his liability on the paper, or by one not a party, who binds himself only if he has a consideration, the guarantor or surety of the payment of a note, unless he has stipulated therefor, is not entitled, by the best opinion, to a demand of

¹² See §§ 236, 240, *ante*.

¹³ See §§ 236, 240, *ante*.

¹⁴ This is sometimes caused by a statute, but the rule is held without a statute. See *Deering v. Creighton*, 19 Oreg. 118; *Tillman v. Wheeler*, 17 John. 326; *Gulden v. Linderman*, 34 Pa. 58; *Cady v. Shepard*, 12 Wis. 639; *Early v. Foster*, 7 Blackf. 35; *Fear v. Dunlap*, 1 Greene, 331; *Holmes v. Preston*, 70 Miss. 152; *De Pauw v. Bank of Salem*, 126 Ind. 553.

¹⁵ *Rey v. Simpson*, 22 How. 341; *Cady v. Shepard*, 12 Wis. 639; *Bright v. Carpenter*, 9 Ohio, 139; *Featherstone v. Hendrick*, 59 Ill. App. 497; *Owings v. Baker*, 54 Md. 82; *Kuntz v. Tempel*, 48 Mo. 71; *Stack v. Beach*, 74 Ind. 571; *Chaddock v. Vanness*, 35 N. J. Law, 517; *Browning v. Mer-*

ritt, 61 Ind. 425; *Faulkner v. Faulkner*, 73 Mo. 327.

¹⁶ *Kingsland v. Koeppe*, 137 Ill. 344; *Strong v. Riker*, 16 Vt. 554. But not, of course, to contradict the actual written guaranty. *Jones v. Albee*, 70 Ill. 34. But see *Lane v. Steward*, 20 Me. 98.

¹⁷ *Gurney v. Giegling*, 108 Mich. 295; *Watson v. Hart*, 6 Grat. 633; *Allen v. Brown*, 124 Mass. 77; *Dale v. Gear*, 38 Conn. 15.

¹⁸ *Heath v. Van Cott*, 9 Wis. 516; *Stack v. Beach*, 74 Ind. 571.

¹⁹ *Coulter v. Richmond*, 59 N. Y. 478; *Deering v. Creighton*, 19 Oreg. 118.

²⁰ *Schneider v. Schiffman*, 20 Mo. 571; *Salisbury v. First Nat. Bank*, 37 Neb. 872.

payment by the holder of the note,²¹ or to notice of non-payment, whether he has been injured by delay or not. The reason is plain: he contracts to perform the maker's obligation, which is to pay without notice. A guarantor for a drawer, however, is entitled to claim a demand and notice to the drawer. But a guarantor may contract for such demand and notice, and then the contract will control.²² Those courts which hold that a demand is necessary against the guarantor generally confine his right to complain to the extent of the injury suffered, and the notice of non-payment is not required to be of the strict character as to time that is given to an indorser.²³

§ 242. **Parties to non-negotiable instruments.**—The great weight of authority is that the drawer or assignor or the indorser, so called, of a non-negotiable instrument is not

²¹ *Read v. Cutts*, 7 Me. 186; *Klein v. Currier*, 14 Ill. 237; *Gage v. Mechanics' Nat. Bank*, 79 Ill. 62; *French v. Citizens' Nat. Bank*, 97 Ind. 211; *Tyler v. Waddington*, 58 Conn. 375; *Clafin v. Reese*, 54 Iowa, 544, *semble*; *Adams v. Gordon*, 22 La. Ann. 41; *Matthewson v. Sprague*, 1 R. I. 8; *Clay v. Edgerton*, 19 Ohio St. 549; *Buchner v. Liebig*, 38 Mo. 188; *Donley v. Camp*, 22 Ala. 659; *Parkman v. Brewster*, 15 Gray, 271; *Hungerford v. O'Brien*, 37 Minn. 306; *Wright v. Dyer*, 48 Mo. 525; *Bloom v. Warder*, 13 Neb. 476; *Stout v. Stevenson*, 4 N. J. Law, 178; *Hough v. Gray*, 19 Wend. 202; *Williams v. Irwin*, 3 Dev. & B. 74 (indorsers sureties by statute); *Carpenter v. McLaughlin*, 12 R. I. 270. *Contra*, *Pierce v. Kennedy*, 5 Cal. 138. But see *First Nat. Bank v. Babcock*, 94 Cal. 96, for present rule. *Lewis v. Brewster*, 2 McLean, 21; *Offutt v. Hall*, 1 Cranch, C. C. 534; *Bradley v. Phelps*, 2 Root, 325 (see *Williams*

v. Granger, 4 Day, 444); *Second Nat. Bank v. Gaylord*, 34 Iowa, 246; *Parker v. Riddle*, 11 Ohio, 102. But see *Forest v. Stewart*, 14 Ohio St. 246; *Sibley v. Van Horn*, 13 Iowa, 209; *Fuller v. Scott*, 8 Kan. 25; *Wheton v. Mears*, 11 Met. 563; *Talbot v. Gay*, 18 Pick. 534; *Newton Wagon Co. v. Diers*, 10 Neb. 284.

²² *Dickerson v. Derrington*, 39 Ill. 574; *Farmers' Bank v. Kercheval*, 2 Mich. 504; *Clay v. Edgerton*, 19 Ohio St. 549; *Hammond v. Chamberlain*, 26 Vt. 406. See *Sylvester v. Downer*, 18 Vt. 32; *Woodson v. Moody*, 4 Humph. 303.

²³ *Rhett v. Poe*, 2 How. 457; *Reynolds v. Douglass*, 12 Pet. 497; *Martyn v. Lamar*, 75 Iowa, 235; *Parkman v. Brewster*, 15 Gray, 271; *Johnson v. Wilmarth*, 13 Met. 416; *Gibbs v. Cannon*, 9 S. & R. 198; *Sibley v. Van Horn*, 13 Iowa, 209; *Fuller v. Scott*, 8 Kan. 25. And see cases *contra*, in note 21, *supra*.

entitled to have a demand made upon the drawee;¹ but if the instrument is a promise to pay money at a day certain, there is no reason for holding that the indorser of such a document ought not to be entitled to all the rights of an ordinary indorser of a negotiable promissory note, or where the order is for money, a sum certain, words of negotiability are not necessarily required to make it a bill of exchange, and hence demand and notice ought to be necessary.² The reason, however, doubtless is that the law as to demand and notice is a part of the law merchant, applicable to negotiable instruments as such, and ought to have no application to instruments that do not fall within this class. But there are other decisions which require such demand as to the drawer and indorser of a non-negotiable order,³ and one exception that might seem reasonable is that, if the indorsee shows that he treated the order as negotiable, then the indorser is entitled to the rights of an indorser of a negotiable instrument.⁴ But whether the instrument be negotiable or not is purely a matter of law, and a mistake of law is not usually held to give the man who makes it or who concurs in it any right from the standpoint of civil liabilities, unless the circumstances would amount to an estoppel. The courts which hold this rule that a demand must be

¹ *Seymour v. Van Slyck*, 8 Wend. 403; *Ish v. Mills*, 1 Cranch, C. C. 567; *Huse v. Hamblin*, 29 Iowa, 501; *Briggs v. Parsons*, 39 Mich. 400; *Smith v. Barnes*, 24 Ga. 442; *Richards v. Waring*, 1 Keyes, 576; *Ford v. Mitchell*, 15 Wis. 304 (a certificate of deposit held non-negotiable); *Lyell v. Lapeer Co.*, 6 McLean, 446 (municipal order); *Steel v. Davis Co.*, 2 G. Greene, 469 (municipal order); *Pitman v. Brackenridge*, 3 Gratt. 127; *Sinclair v. Johnson*, 85 Ind. 527. A guarantor of an order can require no notice of non-payment. *Gammel v. Parramore*, 53 Ga. 54. See, for the effect of an at-

torney's receipt, *Runnells v. Spencer*, 1 Miss. 362. Compare *Wood v. Duval*, 9 Leigh, 6.

² An order for money, see the next note.

³ *Hawkins v. Barney*, 27 Vt. 392 (injury must be shown); *Adams v. Boyd*, 33 Ark. 33; *Hart v. Eastman*, 7 Minn. 74; *Rhodes v. Morgan*, 1 Baxt. 360; *Brown v. Teague*, 52 N. C. 573; *Henderson v. Griffin*, 3 Mart. (N. S.) 403; *Strader v. Batchelor*, 8 B. Mon. 168; *National Bank v. Gooding*, 87 Me. 337. For order on an attorney, see *Wood v. Duval*, 9 Leigh, 6.

⁴ *Haber v. Brown*, 101 Cal. 445.

shown as to the indorser of a non-negotiable order must necessarily hold the same rule as to the drawer of an order,⁵ but in no event ought the defense to be allowed except as to the amount of injury suffered.⁶ But unless the order be for money, certainly it needs no demand as to the drawer or indorser. Thus an order for lumber needs no presentment.⁷ And orders of public corporations issued by authority of law need no demand as against an indorser.⁸

§ 243. Parties to certificates of deposit.— Courts have spoken of certificates of deposit as the promissory notes of the bank issuing them, and apparently upon that theory it has been held that being, if payable upon demand, demand notes, as to one who made the deposit for the benefit of the payee as a payment they should be presented within a reasonable time.¹ Another court seems to have treated the certificate as a check and held that the certificate must be presented as against an indorser upon the next business day,² although it is certain that if the payee and indorser requested or acquiesced in the delay they could not object.³ But the better authority is that such certificates are not subject to the rule as to the necessity of a demand in order to bind the indorser,⁴ although the holding mentions the wholly untenable ground that the certificate was not negotiable.⁵ The

⁵ See cases in note 3, *supra*.

⁶ *Hawkins v. Barney*, 27 Vt. 392.

⁷ *Smith v. Barnes*, 24 Ga. 442.

⁸ *Lyell v. Lapeer Co.*, 6 McLean, 446; *Steel v. Davis Co.*, 2 G. Greene, 469. For rule as to presentment for acceptance, see §§ 207, 208, *ante*.

¹ *Bower v. Hoffman*, 23 Md. 263. The great weight of authority is that these certificates of the bank are promissory notes and negotiable as such. *Miller v. Austin*, 13 How. 218; *Brummagin v. Tallent*, 29 Cal. 503; *Swift v. Whitney*, 20 Ill. 144; *Kilgore v. Buckley*, 14 Conn. 362; *Maxwell v. Agnew*, 21 Fla. 154;

Citizens' Bank v. Brown, 45 Ohio St. 39; *Bean v. Briggs*, 1 Iowa, 148; *Blood v. Northrup*, 1 Kan. 28; *Fells Point Sav. Inst. v. Weldon*, 18 Md. 320; *Mitchell v. Easton*, 37 Minn. 335; *Frank v. Wessels*, 64 N. Y. 155; *Curran v. Witter*, 68 Wis. 16. *Contra*, *Shute v. Pacific Nat. Bank*, 136 Mass. 487; *Lebanon Bank v. Mangam*, 28 Pa. 452.

² *Piner v. Clary*, 17 B. Mon. 645.

³ *Cate v. Patterson*, 25 Mich. 191.

⁴ *Lindsey v. McClelland*, 18 Wis. 481. See *Pardee v. Fish*, 60 N. Y. 265.

⁵ See § 161, *ante*.

sufficient reason for the rule is that such certificates are not issued for the purpose of maturing at any fixed time, whether they are demand certificates or are payable upon time, or interest-bearing or not subject to interest, and therefore a demand at any time before they are barred by the statute of limitations (which of course destroys the liability of both the bank and the indorser) is a demand within a reasonable time.⁶ Subject to this rule, however, a demand on the bank or a sufficient excuse for want of it must be shown before an indorser upon the certificate can be charged, or before the bank could be charged.⁷

§ 244. Forged, stolen and void paper.—If the paper be forged and therefore a nullity, nothing whatever passed from the indorser to the indorsee, and therefore no demand of payment of the paper, or of acceptance where that is required, needs be shown in order to charge an indorser thereon who indorsed the paper after the forgery was committed.¹ Since the forgery must be a material alteration, it follows that if it be made by a party to the paper the paper is destroyed;² therefore where such a forgery appears, no question can arise upon the liability of any of the parties prior to the forgery. And this is true whether the forgery be of an indorser's name or of a material alteration in the paper. But if the alteration be made not fraudulently, or by a stranger, the holder may under some circumstances enforce the paper as it originally stood, by restoring it to its original condition;³ and blanks left in commercial paper which have been improperly filled up do not avoid the paper in the hands of a

⁶ Pardee v. Fish, 60 N. Y. 265. But this cannot be safely relied upon as the law, and caution would suggest presentation of the certificate by the indorsee at the proper time.

⁷ Pardee v. Fish, 60 N. Y. 265; Riddle v. First Nat. Bank, 27 Fed. R. 503. But see Beardsley v. Webber, 104 Mich. 88. For the discussion of this question, see § 161, *ante*.

¹ Goddard v. Merchants' Bank, 4 N. Y. 147; Harrison v. Smith, 2 Willson Civ. Cas., § 396. But see Collier v. Budd, 7 Mo. 485.

² Wood v. Steele, 6 Wall. 80; Mersman v. Werges, 112 U. S. 139.

³ See the article Alteration of Instruments in 2 Am. & Eng. Encyc. Law (2d ed.), 213, 261.

bona fide holder.⁴ In the case of alteration by a stranger and the paper restored to its original form, it is conceived that the rights of the various parties would remain what they were upon the unaltered paper. Paper void in its inception does not need a demand of payment in order that an indorser be held.⁵

Stolen paper, if in negotiable form to pass by delivery, gives a good title to a *bona fide* holder, and the rights of such a holder and the requirements of him as to demand would be the same as those governing any other holder. If the paper was stolen not in such negotiable form, the transferee under the thief would get no title, just as he would not if he were not a holder for value and in good faith, or if he were a transferee after maturity and therefore put upon notice. In such case the true owner would proceed as if he had the paper, giving such guaranties as he would be required to give; but the rights of the parties as to a demand would be the same as if the paper had not been stolen, although the loss of the paper might, as in the case of paper actually lost, excuse some delay.⁶

§ 245. Sufficiency of the demand.—The question as to whether a demand of payment has been made depends, of course, upon whether a proper demand has been made, and this must be determined with reference to the person who makes the demand and the person upon whom the demand has been made, and the place and time of making it. The person to make the demand depends upon the nature of the instrument. Foreign bills of exchange are governed by one rule, and domestic paper, including promissory notes, checks, inland bills, certificates of deposit and certified checks, are governed by another rule. The person upon whom to make the demand must be determined by the presence or absence of the person upon whom the demand ought to be personally made. The elements of place of demand and time of mak-

⁴ Angle v. N. W. Mut. Life Ins. Co., 92 U. S. 330.

⁶ Benton v. Martin, 31 N. Y. 382; Aborn v. Bosworth, 1 R. I. 401.

⁵ Chandler v. Mason, 2 Vt. 193.

ing the demand enter largely into the question. The death of the holder or of the party upon whom demand is to be made introduces further variations as to the person and time and place. The character of the paper, as to whether it is a check or a bill of exchange or a note or other paper, will vary the rule as to the time of the demand. The consideration as to whether the paper is payable at a certain place or not made so payable affects the place of the demand. Customs and business usages also have their influence. If no demand is made it may be excused by a waiver of a demand, by a lack of right or authority to draw in the case of a bill of exchange or a check, by a change of the residence of the party upon whom demand is to be made, or by his absconding, or by a state of war, or the prevalence of an epidemic. Generally the question of reasonable diligence on the part of the holder will be controlling as an excuse for failure to demand. The divisions of the subject which follow seem to be the most appropriate to the subject.

§ 246. Person to make demand on foreign bills.— Since a foreign bill of exchange must be protested if not paid, the demand, unless there be no anticipation of a refusal of acceptance or of payment, should be made by a notary public.¹ The notary public is authorized to act in any of the ways in which an agent can be authorized, as pointed out in the case of domestic paper in the next section.² The test of whether bills of exchange are foreign is whether the bill is drawn in a foreign country payable in this country or *vice versa*, or drawn in one state payable in another state.³ If the bill indicates where it is drawn or where payable, it is no less a foreign bill because all the parties reside in one state.⁴ But

¹ Union Bank v. Hyde, 6 Wheat. 572; Commercial Bank v. Varnum, 49 N. Y. 269; Cribbs v. Adams, 13 Gray, 597.

² See § 247, *post*, notes 7 to 12.

³ Bills drawn in one state payable in another are foreign bills (Townsend v. Sumrall, 2 Pet. 170; Buckner

v. Finley, 2 Pet. 596; U. S. Bank v. Daniels, 12 Pet. 32), although all the parties reside in the state. Mason v. Dousay, 35 Ill. 424; Freeman's Bank v. Perkins, 18 Me. 292.

⁴ See the last two cases in the preceding note.

where the bill does not indicate the residence of either party or the place of payment, the fact may be shown⁵ in order to determine the nature of the bill. The rule requiring a notarial protest is satisfied by the protest of a *de facto* notary; but it has been said that a notary commissioned by a state government after its attempted secession from the Union was not a *de facto* notary;⁶ but the protest is not rendered invalid, the same court has held, by the fact that the notary is an officer of a seceding state.⁷ The necessity or the occasion for such decisions is not likely to recur. But the notary can act only in the district or county wherein his authority extends.⁸ If there is no notary at the place of payment, the bill may be protested by any substantial person in the presence of witnesses.⁹ Where the interest of a witness disqualifies him from testifying, a condition which no longer exists except in peculiar instances, such a disqualified witness is not a competent notary to protest a bill. Thus where a notary was a stockholder in a bank, it was held that he could not protest a bill owned by the bank.¹⁰ But the reason of the rule has ceased when interest ceases to disqualify a witness.¹¹ In some localities it is still the rule that a so-called atheist or unbeliever in a future state of rewards and punishments is not a competent witness, and the reason of the rule would disqualify him as a notary. But the son of the holder may as a notary protest his father's bill.¹² The demand of payment must be made by the same notary who protests the bill,¹³ and the rule seems to be that the clerk of the notary cannot make the demand and the notary protest

⁵ *Harmon v. Wilson*, 1 Duv. 222.

⁶ *Todd v. Neal*, 49 Ala. 266. But he may be an officer of a seceding state. *Tyrie v. Rives*, 57 Ala. 173.

⁷ See last note.

⁸ *Gordon v. Dreux*, 6 Rob. (La.) 399; *Neeley v. Morris*, 2 Head, 595.

⁹ *Bank of Kentucky v. Pursley*, 3 T. B. Mon. 288.

¹⁰ *Herkimer Bank v. Cox*, 21 Wend. 119; *Bank v. Porter*, 2 Watts, 141.

¹¹ *Nelson v. First Nat. Bank*, 65 Fed. R. 798 (C. C. A.); *Morland v. Citizens' Sav. Bank*, 97 Ky. 211.

¹² *Eason v. Isbell*, 42 Ala. 456; *Waters v. Petrovic*, 19 La. 584. The maker of the note may as a notary protest. *Dykman v. Northridge*, 153 N. Y. 662, 1 App. Div. 26.

¹³ *Kentucky Commercial Bank v. Barksdale*, 36 Mo. 563.

the bill;¹⁴ nor can the notary make the protest upon the demand of some one else;¹⁵ and a protest by the clerk or the deputy of a notary is not good, even if the clerk or deputy presents the bill and makes the demand.¹⁶ But this rule is relaxed or denied by some courts as to a notary's clerk or deputy in large cities,¹⁷ and in other courts the custom is held to justify the clerk's or deputy's acting,¹⁸ and in other instances the notary is empowered by law to appoint a deputy.¹⁹ If the notary is authorized by law to appoint a deputy, a protest by the notary upon a demand by his deputy is sufficient.²⁰ But certainly a protest by the clerk of a notary without the knowledge of or any authority from the notary is not valid.²¹ Under the statutes of many states protest is permitted as to domestic paper,²² and if the statute be held to mean protest by a notary, the demand should be made by the notary in order to prove protest by his certificate, unless a statute otherwise permit as to a clerk or deputy.²³ The party who employs a notary as an agent either imme-

¹⁴ Kentucky Commercial Bank v. Barksdale, *supra*; Gawtry v. Doane, 51 N. Y. 84; Williamson v. Turner, 2 Bay, 410; Hunt v. Maybee, 7 N. Y. 266. See Bank of Kentucky v. Gary, 6 B. Mon. 626; McClane v. Fitch, 4 B. Mon. 599; Lee v. Buford, 4 Met. (Ky.) 7; Chew v. Read, 11 Smedes & M. 182; Carter v. Union Bank, 7 Humph. 548 (statutes allowing notary to appoint deputy); so Bank of Louisiana v. Lawless, 3 La. Ann. 129.

¹⁵ Marsaudet v. Jacobs, 6 Rob. (La.) 276; Shepherd v. Jonte, 14 La. 246; Meise v. Newman, 76 Hun, 341.

¹⁶ Donegan v. Wood, 49 Ala. 242; Chenoweth v. Chamberlin, 6 B. Mon. 60, *semble*; Cribbs v. Adams, 13 Gray, 597; Ellis v. Commercial Bank, 7 How. (Miss.) 294; Commercial Bank v. Barksdale, 36 Mo. 563 (demand by notary's partner who

was also a notary); Onondaga Bank v. Bates, 3 Hill, 53; Lock v. Huling, 24 Tex. 311. See Bank of Alexandria v. Wilson, 2 Cranch, C. C. 5. This decision may be put upon the ground that a demand not by a notary is good except where notary's demand is compulsory; provided the person making the demand testifies and reliance is not placed on the certificate.

¹⁷ Monroe v. Woodruff, 17 Md. 159; Sacridier v. Brown, 3 McLean, 481.

¹⁸ Miltenberger v. Spaulding, 33 Mo. 421. This creates a new species of public officer.

¹⁹ See last two cases in note 14.

²⁰ See cases cited in note 14.

²¹ Sacridier v. Brown, 3 McLean, 481.

²² See § 310, *post*.

²³ See notes 14 and 16, *supra*.

diately or mediately through a collecting bank or collecting agency, so far as the person sought to be charged is concerned, must bear the result of the notary's inadequate demand,²⁴ or want of diligence in making the demand, just as if he were a private individual.²⁵ The rules as to the notary's action in making a demand of payment apply with equal force to the notary's presentation for acceptance, where such presentation is required.²⁶

§ 247. By whom demand made on domestic paper.—Domestic paper, which includes everything requiring a demand of payment, such as promissory notes, checks, orders or certificates of deposit, does not require a notarial demand unless a statute so provides.¹ And this is true though a note be made in one state payable in another.² Yet without a statute, if such paper is presented and protested by a notary, the fact may be proven as a demand by the holder through an agent.³ The demand must be made by the holder or his

²⁴ *Davy v. Jones*, 42 N. J. Law, 28; *Allen v. Merchants' Bank*, 22 Wend. 215.

²⁵ See § 182, *ante*, showing a number of cases of this character. *Rosson v. Carroll*, 90 Tenn. 90.

²⁶ *Phillips v. McCurdy*, 1 Har. & J. 187. *Lenox v. Leverett*, 10 Mass. 1, holds that a foreign draft sued upon for non-payment must show both protest for non-acceptance and non-payment. The rule is different as to bills drawn in this country upon Europe. *Brown v. Barry*, 3 Dall. 365; *Clarke v. Russell*, 3 Dall. 415.

¹ Inland bills need not be protested by notary. *Young v. Bryan*, 6 Wheat. 146; *McCord v. Curlee*, 59 Ill. 221; *Miller v. Hackley*, 5 Johns. 375; *Knott v. Venable*, 42 Ala. 186. Promissory notes need not. *Young v. Bryan*, 6 Wheat. 146; *Burke v.*

McKay, 2 How. 66. Though statute makes notary's certificate evidence, it does not make protest by a notary compulsory. *Bryant v. Lord*, 19 Minn. 396. See *Tevis v. Randall*, 6 Cal. 632. Checks need no notarial protest. *Griffin v. Kemp*, 46 Ind. 172; *Wittich v. First Nat. Bank*, 20 Fla. 843; *Pollard v. Bowen*, 57 Ind. 232; *Mutual Nat. Bank v. Rotgé*, 28 La. Ann. 933; *Wood River Bank v. First Nat. Bank*, 36 Neb. 744. But if the statute permits, any paper may be protested. *Moses v. Franklin Bank*, 34 Md. 574.

² *Smith v. Little*, 10 N. H. 526. But a check drawn in New Orleans on London needs notarial protest. *New Orleans Bank v. Girard Bank*, 10 La. 562.

³ He may testify to the fact as any other witness who made demand. See note 6.

agent.⁴ The ownership of the paper is determined by the ordinary rules of law applicable. A bailee or pledgee of paper who holds the paper as collateral security or for the purposes of collection may be considered the owner, but the distinction is not important, because even if not holder he is agent. Where the wife's personal property passes by marriage to the husband he is the owner of paper owned by his wife upon marriage, and properly makes the demand in order to reduce the property to possession.⁵ The demand may be made by any one lawfully in possession and competent to testify.⁶ Possession is sufficient evidence of authority to demand payment.⁷ A person who receives or holds the paper for collection may make demand⁸ or authorize it.⁹ The authority of the clerk, or on principle any other employee, of the holder to make the demand need not be shown.¹⁰ The indorsement by the cashier of a bank of the bank's paper to a cashier of another bank is certainly within the scope of his authority, and is presumed to be authorized.¹¹ The verbal request of the holder is sufficient authorization.¹² But where the agent's authority is terminated by the death of his principal, a demand by the agent after the death is insufficient.¹³

§ 248. On whom demand to be made.—The general statement of the rule for making a demand upon the obligor upon commercial paper, where a demand is required, is that the

⁴ *Gale v. Tappan*, 12 N. H. 145.

⁵ It is of little importance whether he be considered holder or agent.

⁶ *Shed v. Britt*, 1 Pick. 401; *Cole v. Jessup*, 10 N. Y. 96; *Jex v. Tureaud*, 19 La. Ann. 64. See *Batchelor v. Priest*, 12 Pick. 399.

⁷ *Cole v. Jessup*, 10 N. Y. 96; *Agnew v. Bank of Gettysburg*, 2 Har. & G. 478; *Morris v. Foreman*, 1 Dall. 193.

⁸ *Blakeslee v. Hewitt*, 76 Wis. 341; *Powell v. State Bank*, 1 Disn. 260; *Freeman's Bank v. Perkins*, 18 Me. 292.

⁹ See § 182, *ante*.

¹⁰ *Draper v. Clemens*, 4 Mo. 52, so states as to authority to receive a demand, and the same rule must be true as to making demand.

¹¹ *Church v. Barlow*, 9 Pick. 547.

¹² *Freeman v. Boynton*, 7 Mass. 483; *Bank of Utica v. Johnson*, 18 Johns. 230. The drawees may act as agents for the holder in giving notice to other parties. *Mt. Pleasant Branch Bank v. McLeran*, 26 Iowa, 306.

¹³ *Gale v. Tappan*, 12 N. H. 145.

demand should be made upon the drawee or maker, or upon his agent duly authorized.¹ Subject to many limitations arising from considerations as to the proper place to make a demand and as to diligence in discovering the drawee or maker, the rule is correct. If a personal demand is made at a proper time and place and in a proper manner, it is of course sufficient. The ingredients of time and place and a proper manner of making the demand will be discussed in the succeeding sections, but even if the demand be not made in a proper manner or at a proper hour or place, an absolute refusal to pay or to accept, where no objection is made as to the nature of the demand, will cure the defects in the presentment.² The determination of the obligor is not always an easy matter, but generally the persons named as makers or drawees are the proper recipients of the demand. Thus, the makers of a note were the standing committee of the parish, and a demand upon them was held sufficient without any demand upon the treasurer of the parish.³ In the case of joint obligors, the rule is that if the note is joint and several,⁴ or joint,⁵ the demand must be upon each obligor;⁶ and this rule is applied in one jurisdiction, as the cases cited show, to indorsers, who are in fact makers; but some cases which do not seem well decided, considering a joint note in the form

¹ See the cases cited in the following notes, which all recognize the rule.

² *Follain v. Dupre*, 11 Rob. (La.) 454; *Gilbert v. Dennis*, 3 Met. 495; *Waring v. Betts*, 90 Va. 46; *King v. Crowell*, 61 Me. 244; *Parker v. Kellogg*, 158 Mass. 90. A refusal to change account is not a demand and refusal. *Burch v. Newberry*, 10 N. Y. 374. Presenting check for certification not a demand. *Bradford v. Fox*, 39 Barb. 203, wrong, and absurdly so. Certification is payment by a novation. -

³ *Casco Bank v. Mussey*, 19 Me. 20.

⁴ *Blake v. McMillen*, 22 Iowa, 358;

Union Bank v. Willis, 8 Met. 504; *Benedict v. Schweig*, 13 Wash. 476; *Taylor v. Davidson*, 2 Cranch, C. C. 434; *Harris v. Clark*, 10 Ohio, 5; *Greenough v. Smead*, 3 Ohio St. 415; *Shedd v. Britt*, 1 Pick. 401; *Hestus v. Petrovic*, 1 Rob. (La.) 119.

⁵ *Bank of Red Oak v. Orvis*, 40 Iowa, 332; *Arnold v. Dresser*, 90 Mass. 435.

⁶ If one joint obligor is dead, demand must be made on his personal representative. *Hale v. Burr*, 12 Mass. 86; *Haight v. Kindhart*, 1 S. C. 189. This of course does not apply to partnership paper. *Union Bank v. Willis*, 8 Met. 504.

of a partnership venture, hold that a demand upon one of the joint makers is sufficient.⁷ But if some of the makers are accommodation makers and the indorser had notice of that fact, a demand upon the makers primarily liable ought to be sufficient.⁸ In the case of partnership notes a demand upon either partner before dissolution is sufficient.⁹ If the partnership note was made after dissolution in renewal of a partnership note or for a demand against the partnership, a demand upon one partner is sufficient.¹⁰ But where the partnership is dissolved it has been held that, though the holder knew of the dissolution, a demand upon one partner is good, and this is the proper rule.¹¹ Other courts admit the validity of the demand upon one partner where the holder had no notice of the dissolution.¹² Other courts hold that where the holder has notice of the dissolution, or it seems even if he has not such notice, a demand upon one partner after dissolution is not sufficient.¹³ There might be some rational excuse for this holding if the partnership had appointed one of its members to wind up the partnership affairs and this fact was known to the holder. He might then be required

⁷ Harris v. Clark, 10 Ohio, 5. Compare Greenough v. Smead, 3 Ohio St. 415; Hestus v. Petrovic, 1 Rob. (La.) 119.

⁸ Britt v. Lawson, 15 Hun, 123.

⁹ Shedd v. Britt, 1 Pick. 401; Mt. Pleasant Bank v. McLeran, 26 Iowa, 306; Hunter v. Hempstead, 1 Mo. 67; and see the cases in notes 4 and 5, *supra*.

¹⁰ Greatrake v. Brown, 2 Cranch, C. C. 541

¹¹ Crowley v. Barry, 4 Gill, 194; Fourth Nat. Bank v. Hueschen, 52 Mo. 207; Gates v. Beecher, 60 N. Y. 518. This is true of an acceptance also. Kendrick v. Campbell, 1 Bailey, 522. Where partnership is dissolved by death of one partner the demand should be on the surviving partner, not the personal

representative of the deceased partner. Barlow v. Coggan, 1 Wash. Ter. 257.

¹² See the next note.

¹³ See the case of Commercial Bank v. Perry, 10 Rob. (La.) 61, which holds that one partner after dissolution cannot accept, payable at a particular place. If that is so, he cannot accept at all, and therefore a presentment to him for acceptance is not good, and by necessary inference a presentment to him for payment would not be binding. This same court holds the rule as to notice that if given to one partner after notice of dissolution to the holder the notice is not good. It must necessarily hold the same as to a demand. See Nott v. Downing, 6 La. 680.

to present his note to that partner. But the controlling consideration is that when the note was given the holder gained the right to present it for demand to any one of the partners, and to say that the partners can by some arrangement between themselves change the holder's rights, or his transferee's rights, is wholly, profoundly and perfectly absurd. Where the partnership is dissolved by death of one of the partners, the surviving partner or partners gain the right to close up the partnership affairs. A demand upon the survivors, or one of them, is sufficient without any demand upon the personal representative of the deceased partner, because he has nothing to do with the matter. The fact that the individual property of the deceased partner may become liable if the partnership assets are insufficient does not vary the matter, except to the extent of requiring the claim to be presented to the administrator or executor. That presentation is not, however, anything that the indorser can claim, but is a defense for the estate. There is a case, however, which holds that where one partner is dead and his administrator is out of the state, and the other partner has absconded, demand upon the syndic of the firm (who is a sort of statutory assignee) is sufficient.¹⁴ This suggests the rule that, if a partner is dead and the other partners cannot be found, demand should be made upon the administrator or executor of the deceased, which is a very proper rule. But where the firm is insolvent a demand upon the assignee is said not to be sufficient,¹⁵ but that holding is wrong. The only excuse for it is that the individual property of the partners may not be assigned, and therefore the indorser has the right

¹⁴ *Wogan v. Thompson*, 9 La. Ann. 300.

¹⁵ *Armstrong v. Thruston*, 11 Md. 148. Either a demand is excused altogether because the maker is absolutely insolvent (as to this, however, there is considerable question), or the assignee should be considered the agent of the partners to receive a demand. Service of no-

tice of non-payment upon the assignee has been held to be good. *American Nat. Bank v. Junk Bros. Co.*, 94 Tenn. 624, which cites all the authorities. There is one case which rules that a demand on a certificate of deposit must be made upon the receiver of the bank. *Bal-lard v. Burton*, 64 Vt. 387.

to a demand upon one or both of the partners in order to see whether the note might not be paid. But that reason would not be germane, because it would require a presentment to each partner of an insolvent firm still doing business. The indorser is not prejudiced in the least by a failure to demand from all the partners. The rule is unquestionably wrong in Maryland, where it was held because in that state a partnership assignment must include the individual property of the partners, which ought to be the rule everywhere, but some deluded courts deny it. Where the bill of a bank is payable at its branch, but the branch is discontinued, the demand should be made at the bank itself.¹⁶

Where the presentment for payment is made to an agent the difficulty lies in determining whether the agent is authorized to receive the demand. If the authority actually exists no difficulty arises except upon the proof. But where the authority must be implied, the inference arises from circumstances. But if an attorney in fact signs a note, demand may not be made upon him,¹⁷ on the presumption that his authority is co-extensive with the note. And even if the power to pay were given, it would cease upon the death of the principal. The authority would be revoked unless it were coupled with an interest. So if one signs as agent without stating his principal, a demand upon him as agent is good though he had in fact ceased to be agent.¹⁸ The principal should have been given notice if he knew of the note; if he did not, he is bound by his agent's act apparently; but the decision is very questionable unless the holder took all proper steps to ascertain who the principal was. A demand at the place of business of the drawee or maker upon a bookkeeper or clerk, when the drawee or maker is

¹⁶ *Nashville Bank v. Henderson*, 5 Yerg. 104.

¹⁷ *Luning v. Wise*, 64 Cal. 410.

¹⁸ *Hall v. Bradbury*, 40 Conn. 32. Compare *Stinson v. Lee*, 63 Miss. 113, which seems palpably errone-

ous. A demand on the authorized agent is, of course, good. *Phillip v. Poindexter*, 18 Ala. 579. Good on treasurer of corporation for corporation. *Commercial Bank v. Manufacturing Co.*, 23 Me. 280.

absent, is *prima facie* sufficient.¹⁹ If the clerk states that he is authorized to receive the demand it is certainly sufficient.²⁰ The same rule is held as to a firm as drawee.²¹ The rule seems to be that no evidence is needed to show the clerk's authority,²² although such evidence may be given.²³ The person presenting at the place of business is not only justified in relying upon the clerk's statement, but if some one therein states that he is the maker or drawee he may rely upon that statement.²⁴ If no one is at the place of business within business hours of the day, the place being closed, the demand is complete.²⁵ A demand at a bank should be upon some officer or employee in the bank who is competent to make answer to the demand.²⁶

§ 249. Manner of presentation for payment.—Subject to certain qualifications which will appear under the head of demand upon paper payable at a particular place, the general rule unquestionably is that a demand must be accompanied by the instrument itself.¹ It is not necessary that the instrument be actually exhibited, but it is sufficient that the person making the presentment has the instrument ready to produce it if a production of it should be required.² And

¹⁹ Gardner v. Bank of Tennessee, 1 Swan, 420; Decatur Branch Bank v. Hodges, 17 Ala. 42; Draper v. Clemens, 4 Mo. 52.

²⁰ Wesson v. Garrison, 8 La. Ann. 136.

²¹ See Brown v. Turner, 15 Ala. 832.

²² Nelson v. Fotterall, 7 Leigh, 180; Stainback v. State Bank, 11 Gratt. 260; Draper v. Clemens, 4 Mo. 52.

²³ See the cases in the last note.

²⁴ Hunt v. Maybee, 7 N. Y. 266.

²⁵ Wiseman v. Chiapella, 23 How. 366; Baumgardner v. Reeves, 35 Pa. 250; Berg v. Abbott, 83 Pa. 177; Shedd v. Brett, 1 Pick. 413; Great-rake v. Brown, 2 Cranch, C. C. 541.

²⁶ Teller: First Nat. Bank v. Owen,

23 Iowa, 185; bookkeeper: Armor v. Lewis, 16 La. 331. To one apparently cashier. New Orleans R. Co. v. McKelvey, 2 La. Ann. 359. But the officer must be in the bank. Peabody Ins. Co. v. Wilson, 29 W. Va. 528.

¹ Musson v. Lake, 4 How. 262.

² Draper v. Clemens, 4 Mo. 52; Arnold v. Dresser, 90 Mass. 435. But see Maine Bank v. Smith, 18 Me. 99 (customary demand by the cashier of a bank; the note was at the bank in the same town, but cashier did not have it); Gallagher v. Roberts, 11 Me. 489; Union Bank v. Morgan, 2 La. Ann. 418.

if a view of the instrument is requested the demand will not be good unless the instrument be produced, unless it should be lost or destroyed.³ Of course, however, if the note or other instrument be lost or destroyed, its production is not requisite;⁴ but the demand must be accompanied by an offer of the proper indemnity, if such protection is required by the person to be charged.⁵ Some authority holds that the instrument must be exhibited,⁶ while other authority holds that the person making the presentment need not have the instrument to produce, even if requested.⁷ But if the demand is made upon interest coupons the presenter need not have the notes with the coupons.⁸ The person upon whom a demand is made has the right to have the instrument surrendered,⁹ and also the collateral deposited with it, securing it, and this is the reason for the above rule as to presentation; if the person upon whom a demand is made offers and is ready to pay the paper upon surrender of the collateral and the instrument, and the person presenting refuses to so surrender, unless the holder has some other right to retain the collateral, there is no refusal of payment upon which to predicate the liability of an indorser.¹⁰ Whether a presentment made through the mail is a good presentment for payment or not depends upon whether the party to be charged

³King v. Crowell, 61 Me. 244. And see Arnold v. Dresser, 90 Mass. 435. Where a demand is upon interest coupons it is not necessary to have or to produce the note with the coupons. Codman v. Vermont R. Co., 17 Blatchf. 1.

⁴Arnold v. Dresser, 90 Mass. 435.

⁵This is true as to all negotiable paper. But see Hinsdale v. Miles, 5 Conn. 331.

⁶Smith v. Gibbs, 2 Smedes & M. 479; Draper v. Clemens, 4 Mo. 52. Musson v. Lake, 4 How. 262, is a decision as to the statements of a

notarial certificate. It is undoubtedly incorrect, a hasty and inaccurate statement. See the cases in note 2, *supra*, and First Nat. Bank v. Hatch, 78 Mo. 13; Fisher v. Beckwith, 19 Vt. 31.

⁷See cases *contra* in note 2.

⁸Codman v. Vermont R. Co., 17 Blatchf. 1.

⁹Bank of Vergennes v. Cameron, 7 Barb. 143, and cases in notes 1 and 2, *supra*.

¹⁰Ocean Nat. Bank v. Tant, 50 N. Y. 475.

refuses payment.¹¹ If he does refuse to pay it is a good demand; for as in all other cases a refusal to pay the instrument dispenses with a demand or presentment.¹² But if presentment be made through the mail and the person to whom the presentment is to be made pays no attention to the demand, the indorser will be discharged as well as a drawer of a bill.¹³ Sending the paper directly to the drawer or maker is *prima facie* a want of diligence in the holder,¹⁴ and it is easy to see that unless a refusal to pay is received the holder cannot tell whether to give notice of dishonor or not.¹⁵ The demand must also comport with the tenor of the bill or note. Thus, a demand of payment in gold upon a bill not made so payable is not a good demand,¹⁶ and such is the rule as to any other demand which departs from the apparent and legal effect of the instrument.¹⁷

§ 250. Hour of demand.—The consideration as to the proper time in which to make a demand involves two branches: first, the proper hour at which to make a demand; and second, the proper day on which to make a demand.

¹¹ *Carmichael v. Pennsylvania Bank*, 4 How. (Miss.) 567.

¹² *Gilbert v. Dennis*, 3 Met. 495; *Waring v. Betts*, 90 Va. 46; *Legg v. Vinal*, 165 Mass. 555; *Merchants' Bank v. Spicer*, 6 Wend. 443.

¹³ See *Parker v. Stroud*, 98 N. Y. 379; *Stuckert v. Anderson*, 3 Whart. 116; *Barnes v. Vaughan*, 6 R. I. 259; *Halls v. Howells*, Harp. 426. But in two jurisdictions the sending of a notice by a bank by mail that the paper is at the bank and must be paid is a good demand by custom. *Grand Bank v. Blanchard*, 23 Pick. 306; *State Bank v. Smith*, 18 Me. 99. And see *Farmers' Bank v. Duvall*, 7 Gill & J. 78, and cases above in this note, and *Tredick v. Wendell*, 1 N. H. 80. See also § 261, *post*.

¹⁴ *Farwell v. Curtis*, 7 Biss. 160.

But the maker may agree upon a place at which to leave notice of maturity, and it binds the indorser. *State Bank v. Hurd*, 12 Mass. 172. Whatever demand is obligatory on the maker is sufficient as to the indorser. *Bank of Portland v. Brown*, 22 Me. 295.

¹⁵ This is, perhaps, the real reason of the rule.

¹⁶ *Langenburger v. Kroeger*, 48 Cal. 147.

¹⁷ Thus presentation for allowance as a claim against the estate of a deceased maker is not sufficient (*Chase v. Evoy*, 49 Cal. 467); or to ascertain genuineness, or for the purpose of identification, or to learn whether funds to meet it, not sufficient. *Simpson v. Pacific Ins. Co.*, 44 Cal. 139.

The proper hour for a demand involves the consideration of whether the demand is made at the place of business of a person or corporation, or whether the demand is made at the residence of the person upon whom the demand is being made. The place of making the demand depends upon questions which will be discussed under that head. Assuming that a demand is being properly made at a business house, office or room, the general rule is that the demand must be made during business hours.¹ What are business hours must be determined by the customs and methods of doing business in the particular place.² A number of instances will be found in the note below.³ But one peculiar difficulty is to be noted, and that is the case of a bank at which a note is made payable. The demand should be made there on the day of maturity, as will in the succeeding sections be explained. Now some cases hold that the drawee or maker has the whole of the banking hours of the day of maturity in which to pay,⁴ *i. e.*, the last day of grace, if grace is allowed upon the paper, and that a demand made before the close of banking hours upon that day is premature.⁵ Yet other cases hold that the demand must be made at the bank on the last day and during business hours.⁶ It is apparent that no human being can fulfill both requirements unless he can make a demand at the instant of the bank's closing; but the courts are not really so unreasonable as the above statements would indicate. In those states where the maker or drawee has the whole of the banking hours of the day of maturity

¹ Ashton v. Dull, 31 Leg. Int. 61; in the morning). At a bank the demand should be during banking hours. Cayuga Co. Bank v. Hunt, 2 Hill, 635.

² Estes v. Tower, 102 Mass. 65; McFarland v. Pico, 8 Cal. 626.

³ Triggs v. Newnham, 1 C. & P. 631 (at eight in evening); Morgan v. Davidson, 1 Stark. 92 (six or seven in evening); Clough v. Holden, 115 Mo. 336 (at 5:20 in evening), *semble*; Lunt v. Adams, 17 Me. 230 (at eight

⁴ Church v. Clark, 21 Pick. 310; Harrison v. Crowder, 6 Smedes & M. 464 (custom); Planters' Bank v. Markham, 5 How. (Miss.) 397.

⁵ See cases last cited.

⁶ Swan v. Hodges, 3 Head, 251; India Rubber Mfg. Co. v. Bishop, 3 E. D. Smith, 148.

in which to pay the paper, the rule is that demand can be made after the close of business hours if there is any one in the bank to make answer, such as the officers of the bank,⁷ or a teller,⁸ or cashier,⁹ and this is the rule everywhere. Those states which hold that the demand must be made during business hours at the bank permit it to be made upon paper payable at the bank at any time during these business hours.¹⁰ They hold that the maker or drawee must have made provision to pay there at the beginning of business hours, and if a demand is made and a refusal to pay at any time during business hours of the day it is a refusal to pay, even though the maker or drawee did afterwards during the day offer to deposit funds to pay the paper.¹¹ These courts also permit a demand to be made after business hours, provided there be any one in the bank competent to make reply to the demand.¹² But it should be remembered that the question of whether the demand is made in business hours is of importance only where personal demand is not obtained.¹³ If the demand be made personally upon the maker or drawee in his business house, it is of no importance

⁷ *Shepherd v. Chamberlin*, 8 Gray, 225; *Cohea v. Hunt*, 2 Smedes & M. 227; *Barbaroux v. Waters*, 3 Met. (Ky.) 304; *Flint v. Rogers*, 15 Me. 67; *Allen v. Avery*, 47 Me. 287; *Moore v. Britton*, 22 La. Ann. 64; *Reed v. Wilson*, 41 N. J. Law, 29; *Fox v. Newell*, 8 W. L. J. 421.

⁸ *Commercial Bank v. Hamer*, 7 How. (Miss.) 448; *Bank of Utica v. Smith*, 18 Johns. 230.

⁹ See *Lafayette Bank v. McLaughlin*, 4 W. L. J. 70; *Salt Springs Nat. Bank v. Burton*, 58 N. Y. 430.

¹⁰ *Salt Springs Nat. Bank v. Burton*, 58 N. Y. 430; *Thorp v. Peck*, 28 Vt. 127. The same rule applies to paper made payable at any place of business. Presentment for payment may be made at any business hour of the day of maturity.

¹¹ *Moore v. Britton*, 22 La. Ann. 64. While this case may seem to be wrong at first sight, yet if the rule is admitted that a good demand can be made after banking hours, it follows as a matter of necessity that a man must leave his deposit after business hours. But *Salt Springs Nat. Bank v. Burton*, 58 N. Y. 430, has a *dictum* to the contrary. The court intimates that the deposit need be left only until the close of banking hours; but that statement is, like most *dicta*, rash and badly considered. *Etheridge v. Ladd*, 44 Barb. 69 (a store fixed as a place of payment).

¹² See the cases in notes 7, 8, 9, *supra*.

¹³ See cases in note 3, *supra*.

that it is out of business hours,¹⁴ provided it be at some reasonable hour. But where the demand is made upon some one in the office or business house in the absence of the person to be charged, or is made by finding no one there, where that is permissible, the demand should be properly made in business hours,¹⁵ for the very apparent reason that it is only during business hours that either the proprietor or his clerks can be expected to be there, or that any one there can be assumed to have any authority to represent the business of the proprietor.

Now, in the case where demand can be made at a dwelling-house or domicile, the case as to the hour may vary, owing to the fact of the drawee's or maker's presence there. If the maker or drawee is himself served there, it makes little difference what the hour may be, provided it is reasonable;¹⁶ but if the drawee or maker be not personally served, either because he is not there or because no one appears, it should appear that the demand was at some reasonable hour. But if some one appears competent to receive the demand, the hour of the demand, if it be after the usual hour of arising and be before the hour of retiring, can cut but little figure.¹⁷ If no one appears, the hour of the demand should appear to have been a reasonable one.¹⁸ The reason for the above rules is that the drawee or maker may have made provision to pay the note or bill at his office, or, even though he be away from home, may have left proper

¹⁴ Ashton v. Dull, 31 Leg. Int. 61. The fact that the person was in his place of business would seem conclusive evidence as to the reasonableness of the hour.

¹⁵ See cases in note 1, *supra*.

¹⁶ Cayuga Co. Bank v. Hunt, 2 Hill, 635. But 12 o'clock at night, when the party to be charged was aroused from his bed, was held unreasonable. Dana v. Sawyer, 22 Me. 244. See Farnsworth v. Allen, 4 Gray, 453; Skelton v. Dustin, 92 Ill. 94.

¹⁷ See the cases in the preceding note.

¹⁸ This service of demand at the residence, where it is proper, is the equivalent of personal service. If the house is deserted, the inference is that the person was away from home with his family. If there is some one there who receives the demand, the service is as good as if made upon the person himself. See § 259, *post*, as to place of demand.

directions with some one at his residence. The remaining questions, concerned with the time of presentment for a demand, will be discussed in the following sections.

§ 251. Time of demand upon bills of exchange.— Bills of exchange may be drawn payable on demand or at sight, or so many days after sight, or upon a fixed day. As we have seen, a bill payable so many days after sight,¹ and a bill payable at sight,² needs presentment for acceptance, and the non-acceptance of a bill dispenses with the necessity of demand in order to hold the drawer and indorser, if their liability be fixed upon the non-acceptance.³ If the bill be accepted it must none the less be presented for payment to the acceptor in order to hold the drawer and indorsers, unless such demand be excused or waived.⁴ The proper time for a demand may be looked at, first, from the standpoint of delay. The reasonableness of a delay upon a bill of exchange payable on demand or at sight must be determined from the manner in which the bill has been treated by the holder. If the bill has not been put into circulation, a demand of payment upon a bill payable at sight or upon demand must be made within a reasonable time after its reception by the holder;⁵ or if it is a demand bill or a sight bill and it has been accepted, and no date for maturity of the acceptance fixed, the acceptance may go into circulation; demand may be delayed for a reasonable time, it has been held, after its acceptance.⁶ The rule has been held by a court, which did not understand the rule, to be that the bill should be presented for payment upon the same day, or forwarded upon

¹ See § 206, *ante*, note 10.

² See § 206, *ante*, note 11.

³ See § 233, *ante*, note 10.

⁴ See § 293 et seq., *post*, and § 233, *ante*, note 3.

⁵ *Dumont v. Pope*, 7 Blackf. 367 (the document was treated as a bill of exchange); *English v. Trustees*, 6 Ind. 437; *Mohawk Bank v. Broderick*, 10 Wend. 304; *Chambers v.*

Hill, 26 Tex. 472; *Thornburg v. Emmons*, 23 W. Va. 325 (sight draft).

⁶ *Nichols v. Blackmore*, 27 Tex. 586. This case is a good instance of oversight by both court and counsel, for no one seemed to know the difference between an accepted and an unaccepted bill. The statement in the text is what the case amounts to as an actual decision.

the next day after its receipt.⁷ In accordance with the general rule, a sight draft drawn in Arkansas upon the fifteenth day of the month and deposited in a Memphis bank for collection, and presented for payment in Kansas City on the nineteenth day of the month, was considered to have been presented within a reasonable time;⁸ but a sight draft upon New York indorsed to a party in Wisconsin, upon which a delay of fourteen days was had by a particular holder, was held not to have been presented within a reasonable time.⁹ A delay of four days upon a bill of exchange has been held to be unreasonable.¹⁰ The cases upon demand drafts are more numerous under the head of checks, but those cases are not reliable criteria, because a draft payable at sight or after sight or demand may be put into circulation,¹¹ while a check, it appears, is not expected to be so treated. Since such a draft may be put into circulation, it necessarily follows that what is a reasonable time for its presentation for payment, whether the draft is a sight draft or a demand draft, depends wholly upon circumstances. If the draft passes from hand to hand and is by no holder held for an unreasonable time, its presentment cannot be considered as unreasonably delayed.¹² A bill of exchange drawn in the West Indies at sixty days sight upon London was put into circulation and not presented for several months, yet the presentment was in time.¹³ So a bill drawn in Antigua,

⁷ *Slack v. Longshaw*, 8 Ky. Law R. 166. The case cites 1 Daniel, Neg. Inst., sec. 605, but the author does not seem to know that a demand bill can be put into circulation. See *Angaletos v. Meridian Nat. Bank*, 4 Ind. App. 573, holding that demand bills can be put into circulation.

⁸ *Wards v. Sparks*, 53 Ark. 519. The case impliedly holds the above, but the objection was that it was presented for payment prematurely.

⁹ *Walsh v. Dart*, 23 Wis. 334. It

would appear in this case that the court did not seem to know that this draft was presentable for acceptance; but a reference to the former decision, 12 Wis. 635, would indicate that proof was made that under the New York law a sight draft does not require presentment for acceptance.

¹⁰ See note 18, *infra*.

¹¹ *Robinson v. Ames*, 20 Johns. 146.

¹² *Wallace v. Agry*, 4 Mason, 336; *Bolton v. Harrod*, 9 Mart. (O. S.) 326.

¹³ See first case in last note.

one of the West Indies, upon London at ninety days, which was presented after a delay of six months, was presented within a reasonable time, it appearing that the bill had numerous indorsements;¹⁴ and a St. Louis bill at sixty days upon New Orleans which had numerous indorsements was presented in time though delayed for three months.¹⁵ The rule to be extracted from the cases is that the question of reasonable time upon the presentment of the bill depends not only upon the distance and means of communication between the place of drawing and that of payment, but also upon the manner in which the bill has been circulated. A delay of eighty or ninety days,¹⁶ a delay of fifteen days between Ohio and New York City,¹⁷ a delay of two months where the holder resided for part of the time with the drawee,¹⁸ have been judicially determined to be unreasonable, while a delay of forty-seven days,¹⁹ or of ten days,²⁰ has been considered reasonable. Each case depends upon its peculiar circumstances, and not a little upon the disposition of the particular court. It is needless to say that drafts payable at a fixed date must be presented for payment at maturity, just as a promissory note or an acceptance payable

¹⁴ *Gowan v. Jackson*, 20 Johns. 176.

¹⁵ *Little v. Pratt*, 1 Mo. 201. See *Montelius v. Charles*, 76 Ill. 303.

¹⁶ *Brower v. Jones*, 3 Johns. 230.

¹⁷ *Vantrol v. McCulloch*, 2 Hilt. 272.

¹⁸ *Fernandez v. Lewis*, 1 McCord, 322. For other cases of unreasonable delay see *Burrett v. Tidmarsh*, 5 Bradw. 341 (six years); *Bridgeford v. Simon*, 18 La. Ann. 121 (two years); *First Nat. Bank v. Bensley*, 2 Fed. R. 609 (one year); *Bull v. First Nat. Bank*, 14 Fed. R. 612 (five months); *Little v. Phoenix Bank*, 2 Hill, 425, 7 Hill, 359 (ten months); *Olshausen v. Lewis*, 1 Biss. 419 (one month); *Willeys v. Paine*, 43 Ill. 432 (twenty-five days, but the ground of this decision was wholly wrong);

Angaletos v. Meridian Nat. Bank, 4 Ind. App. 573 (two or five months); *Phoenix Ins. Co. v. Allen*, 11 Mich. 501 (twenty days); *Phoenix Ins. Co. v. Gray*, 13 Mich. 191 (twenty-one days); *Orear v. McDonald*, 9 Gill, 350; *Brady v. Little Miami R. Co.*, 34 Barb. 249 (four days); *Taylor v. Sip*, 30 N. J. Law, 284 (two days, but this is wrong. It was a post-dated check put into circulation. The opinion of the chief justice is so manifestly correct that it is amazing to see that the other two judges overruled him).

¹⁹ *Nichols v. Blackmore*, 27 Tex. 586.

²⁰ *National Newark Banking Co. v. Second Nat. Bank*, 63 Pa. 404.

at a fixed date must be presented at maturity in order to hold the drawer or the indorser. Bank drafts, which are drafts by one bank upon another, are said to be governed by a more liberal rule than bills of exchange,²¹ but as a matter of fact bank drafts are simply checks and are to be governed by the rules in regard to checks.²² The delay may be occasioned by a mistake in the postoffice or by the fact that the bill has been lost. The postmaster's mistake will not prejudice the holder, nor will a delay in demand caused by a loss of the bill.²³ One court informs us that the loss of the bill excuses only a reasonable delay.²⁴ It meant to say that a delay on account of the loss of the bill would not be extended to cover a delay not occasioned by the loss of the bill. This time within which presentment for payment should be made may be varied or extended by statute.²⁵

The foregoing cases have been concerned with the fact of a demand not within time. But a bill cannot be properly presented for payment before its maturity. If the bill be accepted so as to fix its maturity, a demand at its maturity is necessary. If the maturity of the bill is fixed by the bill itself, the acceptance must be, as we have seen, unless the drawer and indorsers concur in an extension, one payable upon the day of maturity.²⁶ If the accepted bill is payable at sight the acceptance is not payable until maturity. The maturity of all bills of exchange, except demand bills, is determined by adding to the date of apparent maturity the

²¹ Nutting v. Burked, 48 Mich. 241; Marbourg v. Brinkman, 23 Mo. App. 511. The reason for this statement is not sound, if it is based upon the proposition that bank drafts are supposed to be put into circulation, as is suggested in McDonald v. Mosher, 28 Ill. App. 206, and National Newark Banking Co. v. Second Nat. Bank, 63 Pa. 404. They would be governed by the same rule precisely as a bill of exchange put into circulation.

²² See § 206, *ante*, note 3.

²³ Windham Bank v. Norton, 22 Conn. 213; Pier v. Heinrichshoffen, 67 Mo. 163, which were postal mistakes; Benton v. Martin, 31 N. Y. 382, and Aborn v. Bosworth, 1 R. I. 401 (loss of bill).

²⁴ Aborn v. Bosworth, 1 R. I. 401.

²⁵ See Warner v. Citizens' Bank, 6 S. D. 152.

²⁶ See § 230, *ante*, note 4.

three days of grace, and the presentment for payment must be not before the last of the three days of grace,²⁷ unless the bill is drawn without grace, or unless days of grace upon bills are abolished by statute. A demand of payment before the last day of grace is premature,²⁸ and will not hold the drawer and indorser; and this is true as to the indorser even though the other parties to the bill agree upon an earlier date.²⁹ Days of grace are added even to an acceptance due on a particular day unless it appear that the acceptance included the days of grace. Thus an acceptance due May 21st, where the acceptance was not dated, was due May 24th, and a demand on May 21st was premature.³⁰ It will appear that the time of demand upon bills of exchange may be varied by the usage of banks, or by the death of a party.

§ 252. Time of demand upon notes.—A promissory note differs from a bill of exchange in the fact that it is always payable either at a fixed day or upon demand, and notes payable at a fixed day are like bills so made payable. Promissory notes may be payable upon demand or at a certain date. A demand note as regards the indorser must be presented to the maker for payment within a reasonable time.¹ Statutes fix this time at periods varying from six months to shorter periods.² The statute, of course, is controlling. Until

²⁷ *Edgar v. Greer*, 8 Iowa, 394; *Jones v. Fales*, 4 Mass. 245; *Leavitt v. Simes*, 3 N. H. 14; *Hough v. Young*, 1 Ohio, 230; *Windham Bank v. Norton*, 22 Conn. 213; *Piatt v. Eads*, 1 Blackf. 63.

²⁸ See cases in last note.

²⁹ *Perry v. Green*, 19 N. J. Law, 61, a case on a note. This question could not arise on unaccepted bills of exchange. But this would be the rule on accepted bills. See the next note.

³⁰ *Bell v. First Nat. Bank*, 115 U. S. 373. See *Kenner v. Creditors*, 7 Mart. (N. S.) 540.

¹ *Martin v. Winslow*, 2 Mason, 241; *Mudd v. Harper*, 1 Md. 110; *Perry v. Green*, 19 N. J. Law, 61; *Lockwood v. Crawford*, 18 Conn. 361; *Alexander v. Parsons*, 3 Lans. 333, a note payable one day after sight; *Bassenhorst v. Wilby*, 45 Ohio St. 333.

² *Rice v. Wesson*, 11 Met. 400; *Warner v. Citizens' Bank*, 6 S. D. 152; *Verder v. Verder*, 63 Vt. 38. Sometimes the statute is simply declaratory of the common law (*Davis v. Herrick*, 6 Ohio, 55), but this statute applied to all notes.

that time has elapsed no demand is necessary.³ But if there be no statute controlling, what is a reasonable time must depend upon circumstances and the situation of the parties;⁴ the demand upon notes due at a certain day is governed by the rule that, unless days of grace are abolished by a statute controlling the note, or the paper is payable without grace, the note is entitled to days of grace.⁵ The demand must be made on the day of maturity, which is the last of the three days of grace,⁶ if grace is allowed; a demand before that day is premature;⁷ and a demand after that day is, generally speaking, too late,⁸ unless a custom or usage varies the rule.⁹ Applying the rule of reasonableness to demand notes, it has been held that a demand note, if negotiated, must be presented for payment upon the next day if the parties reside in the same place,¹⁰ and otherwise within due course of mail.¹¹ But no such hard-and-fast rule can be laid down. It is variously stated that a delay of four days¹² is reasonable, but of two weeks,¹³ of four months,¹⁴ of seven months,¹⁵ of eight months,¹⁶ of thirteen months,¹⁷ of sixteen months,¹⁸ of four years¹⁹ and of five years²⁰ is unreasonable,

³ See the first two cases in the last note; and the decision in the other case in the last note held that a delay of eight days was not reasonable.

⁴ *Losse v. Dunkin*, 7 Johns. 70. See *Vreeland v. Hyde*, 2 N.Y. Super. Ct. 429 (a note not for business purposes, where a more liberal rule was applied).

⁵ *Griffin v. Goff*, 12 Johns. 423; *Renner v. Bank of Columbia*, 9 Wheat. 581.

⁶ See the cases in the next two notes and *Peet v. Zanders*, 6 La. Ann. 364.

⁷ *Edgar v. Greer*, 8 Iowa, 394; *Griffin v. Goff*, 12 Johns. 423; *Jones v. Fales*, 4 Mass. 245; *Leavitt v.*

Simes, 3 N. H. 14; *Hough v. Young*, 1 Ohio, 504.

⁸ *Renner v. Bank of Columbia*, 9 Wheat. 581; *Magruder v. Bank of Washington*, 9 Wheat. 598.

⁹ See § 261, *post*.

¹⁰ *Camp v. Scott*, 14 Vt. 387.

¹¹ See last note.

¹² *Laughlin v. Marshall*, 19 Ill. 390, certificate of deposit.

¹³ *Keyes v. Fenstermaker*, 24 Cal. 329.

¹⁴ *Sice v. Cunningham*, 1 Cow. 397.

¹⁵ *Martin v. Winslow*, 2 Mason, 241.

¹⁶ *Field v. Nickerson*, 13 Mass. 131.

¹⁷ *Jerome v. Stebbins*, 14 Cal. 457.

¹⁸ *Good v. Arrowsmith*, Anth. N. P. 289.

¹⁹ *In re Crawford*, Fed. Cas. No.

²⁰ *In re Grant*, Fed. Cas. No. 5691.

but a delay of six days,²¹ of seven days,²² of sixty days²³ is reasonable. There has been some suggestion that if a demand note draws interest the indorser remains liable until a demand is actually made, because the note must have been understood to be a continuing obligation;²⁴ but this rule is denied *in toto* by some authority.²⁵ Another exception as to a demand exists in some jurisdictions as to demand of payment where the parties are farmers. A demand upon the next occasion when a farmer may be expected to desert the plough, such as court day or muster day, is considered sufficient.²⁶ But other courts incline to think that a farmer is a business man and that the necessity of a journey into the country is not an excuse for non-presentment on the day of maturity.²⁷ Notes that are due upon a certain day must be demanded upon that day, making allowance for days of grace if the note is entitled thereto.²⁸ A failure to demand upon the last day of grace,²⁹ or a day later under the usage of banks,³⁰ exonerates the indorser, unless he is an indorser before delivery of the note,³¹ or unless he has assented to a postponement,³² or waived a demand.³³ It seems to have been held that a demand need not have been made upon the day of maturity if the maker lives at a distance,³⁴ but the true rule is that it should be so made. The reason offered is that the holder cannot assume until the close of the day of maturity

3364. A register in bankruptcy had had the marvelous hardihood to decide that four years was a reasonable time.

²¹ *Lindsey v. McClelland*, 18 Wis. 481, certificate of deposit.

²² *Seaver v. Lincoln*, 21 Pick. 267.

²³ *Rice v. Wesson*, 11 Met. 400, *semble*.

²⁴ *Wethey v. Andrews*, 3 Hill, 582; *Weeks v. Pryor*, 27 Barb. 79; *Salmon v. Grosvenor*, 66 Barb. 160; *Merritt v. Todd*, 23 N. Y. 28. See *Crim v. Starkweather*, 88 N. Y. 339; *Sice v. Cunningham*, 1 Cow. 397.

²⁵ *Verder v. Verder*, 63 Vt. 38.

²⁶ *Brown v. Johnston*, 12 N. C. 298.

²⁷ *Kiddell v. Ford*, 2 Treadw. Const. 678.

²⁸ See notes 5, 6 and 8, *supra*.

²⁹ The demand may be at any time on that day at a proper hour. *Estes v. Tower*, 102 Mass. 65; *Gordon v. Parmlee*, 15 Gray, 413.

³⁰ See § 261, *post*.

³¹ See §§ 236 and 240, *ante*.

³² *Lockwood v. Crawford*, 18 Conn. 361.

³³ See § 293 et seq., *post*.

³⁴ *Freeman v. Boynton*, 7 Mass. 488; *Haddock v. Murray*, 1 N. H. 140.

that the maker does not intend to pay. But if for any sufficient reason a demand cannot be made at maturity, a demand must be made as soon thereafter as practicable.³⁵ The effect of war or epidemic in exercising a delay will be noticed later.³⁶ A delay in the postoffice is not to be imputed to the holder,³⁷ nor is a delay rendered necessary through a loss of the note.³⁸ But the inability to cross a river,³⁹ or the occurrence of a hard rain not rendering roads impassable,⁴⁰ or a violent storm rendering travel difficult,⁴¹ is not an excuse for a total failure to present for payment. In such or similar cases the rule is that if the demand is rendered impossible at the time of maturity, a demand should be made as soon thereafter as practicable. The mere absence of the indorser is no excuse for not making the demand, since his presence is not at all necessary.⁴²

§ 253. Paper indorsed overdue.—Special attention must be given to a note or bill indorsed after its maturity, in which case the paper becomes ordinary demand paper. If the note has not been presented for payment at maturity, the indorser upon it, except in exceptional cases, has been released. But if an indorser before maturity takes up and sells the note, after maturity he is liable to the holder upon his former indorsement as a guarantor.¹ Or if the holder of the note who has extended it indorses to an indorsee without notice of the extension, no demand as to him is necessary;² but the indorser after maturity, it has been held,

³⁵ *Jex v. Tureaud*, 19 La. Ann. 64; *Apperson v. Bynum*, 5 Cold. 341.

³⁶ See § 268, *post*.

³⁷ See *Simonds v. Black River Ins. Co.*, Fed. Cas. No. 12,874; *Windham Bank v. Norton*, 22 Conn. 213; *Schofield v. Bayard*, 3 Wend. 488; *contra*, *Grant v. Long*, 12 La. 402 (cases on other kinds of negotiable paper). Would this rule apply while the paper was being transmitted to an agent in order that the agent might make the demand? It should apply if the reasons of the rule are good.

³⁸ See § 251, *ante*, note 23, for other paper.

³⁹ *Durnford v. Johnson*, 2 Mart. (O. S.) 183.¹

⁴⁰ *Barker v. Parker*, 6 Pick. 80.

⁴¹ *McDonald v. Mosher*, 23 Ill. App. 206.

⁴² *Wilson v. Senier*, 14 Wis. 380.

¹ *St. John v. Roberts*, 31 N. Y. 441; *Coleman v. Dunlap*, 18 S. C. 591.

² *Williams v. Probst*, 10 Watts, 111; *Ridgway v. Day*, 13 Pa. 208.

may show in defense of his liability as to his immediate indorsee the non-performance by the indorsee of a special agreement made at the time of the indorsement.³ But generally speaking, an indorser after maturity or dishonor of a note is treated as the indorser of a new note payable upon demand, and the indorser of a bill after maturity is treated as the drawer of a new bill payable upon demand.⁴ It makes little difference whether the indorser is treated as the indorser of a new note or the drawer of a new bill payable upon demand. In either case he is entitled to claim a demand for payment within a reasonable time, whether the maker was insolvent or not at the date of the indorsement, and without regard to the indorser's knowledge of the insolvency.⁵ Here again the cases vary widely in their application of the term "reasonable time." A delay of twenty-five days,⁶ or from April 19th to July 3d in the same year,⁷ or from July 30th to November 21st in the same year,⁸ or of ten months,⁹ or of twenty-four months,¹⁰ or of one year,¹¹ or two years,¹² has been considered unreasonable under varying circumstances, while a delay of twenty-three days,¹³ or

³ *Ridgely v. Davidson*, 2 Mill Const. 33. This may not be shown as to the remote indorsee. *Cox v. Jones*, 2 Cranch, C. C. 370.

⁴ *Beebe v. Brooks*, 12 Cal. 308; *Hunt v. Wadleigh*, 26 Me. 271; *Jones v. Middleton*, 29 Iowa, 188 (the court does not seem to know that it is overruling *Hall v. Monohan*, 6 Iowa, 216); *Sanborn v. Southard*, 25 Me. 409; *Godwin v. Davenport*, 47 Me. 112; *Hart v. Eastman*, 7 Minn. 74; *Union Bank v. Ezell*, 10 Humph. 385; *Corwith v. Morrison*, 1 Pin. 489; *Jones v. Robinson*, 11 Ark. 504; *Stewart v. French*, 2 Cranch, C. C. 300.

⁵ *Cox v. Jones*, 2 Cranch, C. C. 370; *Colt v. Bernard*, 18 Pick. 260; *Tyler v. Young*, 30 Pa. 143; *Shelby v. Judd*, 24 Kan. 161; *Stockman v. Riley*, 2 McCord, 398; *Attwood v.*

Haseldon, 2 Bailey, 457; *Winston v. Kelly*, 33 Tex. 354. *Contra*, if negotiated after dishonor no new demand is necessary. *French v. Jarvis*, 29 Conn. 347; *Hall v. Monohan*, 6 Iowa, 216 (*Seymour v. Van Slyck*, 8 Wend. 421, is cited in the last case, but the court did not understand that case at all). See *McIlhenny v. Jones*, 6 Har. & J. 256.

⁶ *Levy v. Drew*, 14 Ark. 334.

⁷ *Light v. Kingsbury*, 50 Mo. 331.

⁸ *Bassenhorst v. Wilby*, 45 Ohio St. 333.

⁹ *Hill v. Martin*, 12 Mart. (O. S.) 177.

¹⁰ *Eisenford v. Dillenback*, 15 Hun, 23.

¹¹ *Jones v. Robinson*, 11 Ark. 504.

¹² See the case in note 10, *supra*.

¹³ *Goodwin v. Davenport*, 47 Me. 112.

of four weeks,¹⁴ has been considered reasonable. No different rule should be applied than the rule already stated as to demand bills not circulated¹⁵ and demand notes.¹⁶

§ 254. Demand upon checks.—A check being an order payable upon demand and negotiable should be treated as to demand as a demand draft. Generally speaking, a check therefore resembles a demand draft, but business convenience has produced one very important difference. A check, like a demand draft, is not entitled to days of grace,¹ unless it is post-dated upon its face;² nor is the drawer of the check entitled to claim a demand unless he has been injured thereby,³ and then he is released only to the extent of his injury.⁴ But as to the indorser of a check, the same rule prevails as to a demand draft,⁵ except, perhaps, that a check, unless it be a bank check or a certified check, cannot be put into circulation,⁶ although it has been suggested that it can

¹⁴ *Van Hoesen v. Van Alstyne*, 3 Wend. 75. This decision is, of course, wrong. The upper court expresses its regret that the lower court did not do justice *secundum artem*, and then proceeds to make his astounding ruling, which is not so bad as to demand, but is wholly inexcusable as to the notice.

¹⁵ See § 251, *ante*.

¹⁶ See § 252, *ante*.

¹ See § 206, *ante*, note 2.

² See § 206, *ante*, note 8.

³ *Exchange Bank v. Sutton Bank*, 8 Md. 577; *Allen v. Kramer*, 2 Bradw. 205; *Offutt v. Rucker*, 2 Ind. App. 350; *Springfield Fire Ins. Co. v. Tinscher*, 30 Ill. 399 (in this case the document was a check, but the court treats it as a demand draft, and makes a correct ruling, but sees an incorrect *dictum*); *Gough v. Staats*, 13 Wend. 549; *Gregg v. George*, 16 Kan. 546; *Henshaw v. Root*, 60 Ind. 220; *Stewart v. Smith*, Ohio St. 82.

⁴ *Pack v. Thomas*, 13 Smedes & M. 1; *In re Brown*, 2 Story, 502; *Griffin v. Kemp*, 46 Ind. 172; *Woodin v. Frazer*, 38 N. Y. Super. Ct. 190.

⁵ *Veazie Bank v. Winn*, 40 Me. 60; *Parker v. Reddick*, 65 Miss. 242; *Mohawk Bank v. Broderick*, 13 Wend. 133; *First Nat. Bank v. Miller*, 37 Neb. 500; *Gough v. Staats*, 13 Wend. 549.

⁶ See the second and fourth cases in the last note. *Nat. State Bank v. Weil*, 141 Pa. 457; *Industrial Co. v. Weakley*, 103 Ala. 458; *Gifford v. Hardell*, 88 Wis. 538. But *Stephens v. McNeill*, 26 Barb. 651, and *Middleton Bank v. Morris*, 28 Barb. 616, recognize that a check may be put into circulation, especially as to a party who knew that was the intention. See also *Taylor v. Wilson*, 11 Met. 44. As to bank checks, *McDonald v. Mosher*, 23 Ill. App. 206, states the rule with positiveness that they may be put into circulation, and *Nutting v.*

be so treated.⁷ Therefore, as to the regular indorser of a check, or as to a drawer who has been injured, the check must have been presented for payment within a reasonable time under all the circumstances.⁸ If the parties reside in the same place, that reasonable time is at most the next day after its receipt by the holder.⁹ If the parties, holder and drawee, do not reside in the same place, the check should be forwarded upon the next day after its receipt.¹⁰ But the check may be put through the usual course of business, though that course may be circuitous.¹¹ It is not doubted that a party may always deposit a check in a bank for collection or for deposit, and the presentment is reasonable if

Burked, 48 Mich. 241, and Marbourg v. Brinkman, 23 Mo. App. 511, deny the rule as to prompt demand as to bank checks. The rule ought to be, as to bank checks or certified checks, that, if they are actually put into circulation, they are to be governed by the rule as to bills of exchange. See § 251, *ante*. See, as to certified checks, Farmers' Bank v. Butchers' Bank, 4 Duer, 219, 16 N. Y. 125; Thomson v. Brit. North Am. Bank, 45 N. Y. Super. Ct. 1.

⁷ See last note.

⁸ Bull v. First Nat. Bank, 14 Fed. R. 612, reversed in 123 U. S. 105 (both decisions stating the same principle. But the lower court had held that a check not presented within a reasonable time was dishonored and overdue, and therefore an indorsee took subject to equities between the drawer and the first indorser or payee. The upper court reverses this ruling, and holds that a check is not overdue, as to an indorsee for value, until it has been presented for payment and payment has been refused); Mohawk Bank v. Broderick, 10 Wend. 304, 13 Wend. 133; Wood-

ruff v. Plant, 41 Conn. 344; Pollard v. Bowen, 57 Ind. 232; Marbourg v. Brinkman, 23 Mo. App. 511; Hemmelman v. Hotaling, 40 Cal. 111.

⁹ Simpson v. Pacific Mut. Ins. Co., 44 Cal. 139; Cawein v. Browinski, 6 Bush, 457; Wear v. Lee, 87 Mo. 358; Smith v. Miller, 43 N. Y. 171; Doherty v. Watson, 29 Wkly. Notes Cas. 32; Schoolfield v. Moon, 9 Heisk. 171. In First Nat. Bank v. Alexander, 84 N. C. 30, it is suggested that, if the holder of the check knows the bank to be in a failing condition, he should show greater promptitude. The rule excludes Sundays, of course. O'Brien v. Smith, 1 Black, 99.

¹⁰ Smith v. Janes, 20 Wend. 192; N. W. Coal Co. v. Bowman, 69 Iowa, 150. This rule is extended, by statute covering bills of exchange (Warner v. Citizens' Bank, 6 S. D. 152), as to a bank check.

¹¹ Werk v. Mad River Valley Bank, 8 Ohio St. 301; First Nat. Bank v. Buckhannon Bank, 80 Md. 475; Allen v. Kramer, 2 Bradw. 205; Backwill v. Bridgeport Wood Co., 62 Ill. App. 663.

it is consumed in the check's passage through banks;¹² or if the time is taken up, where a check is payable to a principal, in transmitting the check to the principal, the delay is reasonable.¹³ The loss of the check may well occasion delay, but delay is excused only to the extent that it is rendered necessary.¹⁴ But subject to the above qualification and other excuses for delay,¹⁵ the rule is held quite strictly as to checks. A delay of three days, where the parties resided in the same town, or of two weeks, or of six days, or of seven days, or of thirteen days, or of ten months, have been held unreasonable; but each case must be examined to ascertain the varying facts in each case.¹⁶ There is, however, no question that the person to whom the check is intrusted for collection stands in such a relation to the holder that the holder will be responsible for such person's negligence.¹⁷ Some courts impose upon a person who takes a check in payment of a draft or note the utmost diligence, and require a presentment for payment upon the same day.¹⁸ This rule is enforced with especial severity against a bank, or other per-

¹² *Braun v. Kimberlin*, 9 Am. Law Rec. 405; *Loux v. Fox*, 171 Pa. 68; *Cox v. Boone*, 8 W. Va. 500; *Taylor v. Wilson*, 11 Met. 44 (the check seems to have been negotiated). See next note.

¹³ *Rosenthal v. Erlicher*, 154 Pa. 396. *Contra*, *Gifford v. Hardell*, 88 Wis. 538; *Hazleton v. Colburn*, 1 Robt. 345.

¹⁴ See § 244, *ante*, note 6. *Moody v. Mack*, 43 Mo. 210, was wrongly decided, even as to an indorser.

¹⁵ See § 262 et seq., *post*.

¹⁶ *Nat. State Bank v. Weil*, 4 Pa. Co. Ct. R. 346, 141 Pa. 457 (delay of three days). Compare *Woodruff v. Piant*, 41 Conn. 344; *Industrial Co. v. Weakley*, 103 Ala. 458 (six days' delay); *N. W. Coal Co. v. Bowman*, 69 Iowa, 150 (seven days' delay); *Veazie Bank v. Winn*, 40 Me. 60

(three days); *Little v. Phoenix Bank*, 2 Hill, 425, 7 Hill, 359 (ten months, New York on New Orleans); *Carroll v. Sweet*, 30 N. Y. Supp. 204 (nine days); *Dalon v. Davidson*, 59 N. Y. Supp. 394; *Merchants' Bank v. Parker*, 12 N. Y. St. R. 558 (six days). See *State v. Gates*, 67 Mo. 139; *Miller v. Moseley*, 26 La. Ann. 667.

¹⁷ *Simonds v. Black River Ins. Co.*, Fed. Cas. No. 12,874 (even if drawee); *Kilpatrick v. Home Building Ass'n*, 119 Pa. 30 (solicitor of payee); *Wagner v. Crook*, 167 Pa. 259 (drawer). See *Nebraska Nat. Bank v. Logan*, 29 Neb. 278.

¹⁸ *Fernald v. Bush*, 131 Mass. 591. And see the case of *Anderson v. Gill*, 79 Md. 312, in the next note. *Contra*, *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320.

son acting as collection agent, which takes a check for a collection it is making,¹⁹ and when the collecting agent is being held by the person for whom the collection is being made; but one court mistakenly applies this rule as between the drawer and payee of the check, and holds that without instant diligence the original claim is lost.²⁰ But other courts do not admit this rule.²¹ We have already discussed the rule that applies where a check or draft is sent directly to the payee.²² Such conduct is *prima facie* negligent,²³ and the holder becomes responsible for the drawee's negligence.²⁴

The rule that we have been considering applies to the drawer only when he can show an injury. Generally speaking, he can show an injury when the bank fails during the time of delay,²⁵ provided it appears that the bank failed with funds to the amount of the check to the drawer's credit.²⁶ It will not be enough for the drawer to show

¹⁹ *Morris v. Eufala Bank*, 106 Ala. 383; *Smith v. Miller*, 43 N. Y. 171. See *Anderson v. Gill*, 79 Md. 312. This case is as follows: A check was deposited for collection with bank A., which presented it to the drawee bank next day, and took the drawee bank's check on bank C., which was a few blocks distant; the check, being received from the drawee bank about eleven o'clock, was presented to bank C. before three o'clock of the same day, but the drawee bank became insolvent at one o'clock, and hence the check taken in payment was not paid, whereupon bank A. obtained the original check, of which it was owner, and protested it, and the holder of the check sued the drawer of the original check. It was held the holder could not recover from the drawer, because her agent had delayed two hours. The case is undoubtedly wrong, since the payee was suing the drawer, not the payee

suing her agent. The court discovered that fact in *First Nat. Bank v. Buckhannon*, 80 Md. 475, and entered upon one of those efforts to distinguish, which are so pathetic. *Smith v. Miller*, 43 N. Y. 171, supports the rule as it is stated in the text. See *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320; *Kobbi v. Underhill*, 3 Sandf. Ch. 277; *Johnson v. Bank of North America*, 5 Robt. 554.

²⁰ See last note.

²¹ See last note.

²² See § 181, *ante*, note 1.

²³ See last note and note 17, *supra*, and *Anderson v. Rogers*, 53 Kan. 542. But *Nebraska Bank v. Logan*, 29 Neb. 278, must be *contra*, although it was a question of holding the drawer.

²⁴ See note 17, *supra*.

²⁵ *Holmer v. Roe*, 62 Mich. 199; *Edwards v. Moses*, 2 Nott & McC. 433; *Case v. Morris*, 31 Pa. 100.

²⁶ *Kenyon v. Stanton*, 44 Wis. 479;

that his check would probably have been paid, unless he go further and show that he had an obligatory arrangement with the bank whereby his check would have been paid, and in that way had in the bank sufficient funds to pay the check, and that he lost those funds entirely.²⁷ The reason of this rule is plain. If he drew out all his money, he lost nothing by the delay. The bank would not have been required to make a partial payment on the check, and hence the drawer cannot claim an injury.²⁸ If he has drawn his funds out of the bank, even though the check would have been paid if presented at a proper time, he has suffered no injury, because the non-presentment of the check did not affect him in the least;²⁹ nor will it be an injury to him that although he drew out his funds, the assignee of the bank recovered from him the money drawn out.³⁰ Nor will the loss of a secret equity between the drawer and the payee of the check release the drawer as against an assignee of the check who has failed to make a due presentment at the bank.³¹ Where a man has a special kind of money deposited which depreciates in value pending the holder's delay, the drawer will be released *pro tanto*.³²

Lowenstein v. Bresler, 109 Ala. 326;
Lawrence v. Schmidt, 35 Ill. 440;
Fletcher v. Pierson, 69 Ind. 281.
But this rule seems to be denied in
the two last cases cited in the pre-
ceding note. See Culver v. Marks,
122 Ind. 554.

²⁷ Lowenstein v. Bresler, 109 Ala.
326. See last note.

²⁸ Lowenstein v. Bresler, 109 Ala.
326.

²⁹ See cases in note 26; Industrial
Co. v. Weakley, 103 Ala. 458.

³⁰ Kenyon v. Stanton, 44 Wis. 479;
but see Industrial Co. v. Weakley,
103 Ala. 458. The drawer had not
sufficient funds, but he had a credit
with the bank to the amount of the
check.

³¹ Stewart v. Smith, 17 Ohio St. 82.
This decision is put upon a wrong
ground. The real ground is that
the check is not dishonored so as
to become subject to equities be-
tween drawer and payee until it
has been presented and dishonored.
See Bull v. First Nat. Bank, 123
U. S. 205.

³² St. John v. Homans, 8 Mo. 382;
but see Morrison v. McCartney, 30
Mo. 183. These cases show the ab-
surdity of the old paper currency.
The case of Willets v. Paine, 43 Ill.
432, attempts to decide this point,
but since the drawer had a general
credit, not a credit of particular
money, the decision is absurd.

§ 255. Demand upon bank checks and certified checks.

Bank checks are sometimes considered as drafts, but they are in fact checks.¹ No reason can be seen why a bank as well as any other depositor cannot draw a check upon a bank where it has money deposited to its general credit.² It may be, however, that the check will be so drawn as to be a bill of exchange, but any other drawer may draw such a check.³ The rule as to presentment of bank checks is precisely the same as that applied to other checks⁴ if they are not put into circulation. As to certified checks, the rule of law varies as to the party obtaining the certification. If certified to the holder, the check becomes the bank's obligation, and the drawer and indorsers before certification are released because the check is paid.⁵ If the drawer of a check obtains a certification and then delivers it, he becomes released in the same way he would become released upon an uncertified check,⁶ and the same rule would apply to an indorser.⁷ But the case of an indorser of a check certified to the holder does not seem to have arisen. But upon principle such an indorser is the indorser of a demand note or an acceptance put into circulation, and his rights are governed by the rules heretofore given.⁸

§ 256. Holidays and Sundays.—If an instrument be entitled to days of grace, and the last day of grace falls upon Sunday or a holiday, demand should be made upon Saturday, which would be the second day of grace;¹ but if that

¹ See § 206, note 3.

² It is a common custom.

³ The bank draft upon another bank may be a sight draft, but no business man would take such a draft if he had looked at the face of the draft. It would be entitled to days of grace.

⁴ See note 6 to the preceding section.

⁵ See § 150, *ante*.

⁶ See § 150, *ante*.

⁷ He would be simply the indorser

of an ordinary check put into circulation. See note 6 to the preceding section.

⁸ See note 6 to the preceding section. *Roberts v. Wold*, 61 Minn. 291.

¹ *Kuntz v. Temple*, 48 Mo. 71; *Brennan v. Vogt*, 97 Ala. 647. See *Doremus v. Benton*, 5 Biss. 57. In computing time by days, the day of making either of note, bill or acceptance is excluded. *Fisher v. State Bank*, 7 Blackf. 610; *Broddie v. Searcy*, 7 Tenn. 183; *Bradley v.*

Saturday is also a holiday, demand should be made upon Friday.² If the third day of grace falls upon Saturday, and there is a banking custom known to the parties that allows demand on the fourth day of grace, and if that fourth day should be Sunday allows demand upon Monday, such custom, it appears to be inferentially held in one case, would be valid, although it was held in the particular case that there was no sufficient proof of the custom.³ But instruments that are not entitled to grace, which fall due upon Sunday, may be demanded upon the following day.⁴ If the instrument is entitled to grace, and the day of its maturity without allowing grace is Sunday, it is demandable upon Wednesday, the third day of grace after the date it is made due. It cannot be demanded upon Tuesday.⁵ Statutes are now very common upon the subject of holidays, but those statutes govern, of course, only instruments made after the passage of the act.⁶ These statutes are sometimes declaratory of the common law and sometimes change that rule.⁷ Cases will be found in the note; a discussion of them would simply be confined to questions of statutory construction. It should be remembered that holidays may exist by custom as well as by law.⁸

Northern Bank, 60 Ala. 252. In adding by months the rule is to use calendar months. *Roehner v. Knickerbocker Life Ins. Co.*, 63 N. Y. 160. But February 29th is a day when it comes into the computation. *Helphenstine v. Vincennes Nat. Bank*, 65 Ind. 582. See *Wagner v. Kenner*, 2 Rob. (La.) 120.

² *Sasscer v. Farmers' Bank*, 4 Md. 409. This must not be confused with the rule as to notice. See *Hitchcock v. Hogan*, 99 Mich. 124.

³ *Adams v. Otterback*, 15 How. 539. Compare *Thornton v. Stodert*, 1 Cranch, C. C. 534.

⁴ *Sanders v. Ochiltree*, 5 Port. 73;

Salter v. Burt, 20 Wend. 205 (post-dated check). *Contra*, *Barker v. Parker*, 6 Pick. 80.

⁵ *Bartlett v. Leathers*, 84 Me. 241; *Roberts v. Wold*, 61 Minn. 291.

⁶ *Toothaker v. Cornwall*, 3 Cal. 144. This decision is wrong on the main point.

⁷ *Homes v. Smith*, 20 Me. 264; *First Nat. Bank v. McAllister*, 33 Neb. 646; *Hagerty v. Engle*, 43 N. J. Law, 299; *Hershfield v. Fort Worth Nat. Bank*, 83 Tex. 452. And see note 1, *supra*.

⁸ *City Bank v. Cutter*, 3 Pick. 414; *Dabney v. Campbell*, 9 Humph. 680.

§ 257. **Time of demand as affected by sickness or death of party.**—The time of demand upon negotiable paper may be affected either by the death of the holder or the death of the obligor upon whom demand is to be made. The death of the holder excuses a presentment until within a reasonable time after the appointment of a personal representative who is the proper party to make the demand. But as soon as the personal representative is appointed a demand should be made at the earliest practicable time thereafter.¹ A case which in its decision presents an exceedingly reasonable view of the law arose on account of the death of the holder. The executor appointed by the will of the deceased found the note three days before its maturity and thereupon requested the indorsers to waive demand and notice, but they refused to do so. The executor proved the will afterwards within a month, but immediately relinquished his executorship and never qualified. Thereupon an administrator was appointed. He found the note within a week after his appointment and presented it for payment the next day, and the demand was considered to be seasonable.² The same indulgence is shown in case the agent of the holder should die, such as a notary.³ If the delay be caused by the death of the agent alone, and the agent was not guilty of negligence in improperly delaying the demand before his death, the holder is not prejudiced unless he was himself chargeable with a want of diligence. This rule is eminently reasonable, for there is no negligence of any agent; the agent has ceased to exist. Sickness of the holder, in order to excuse delay, must have been so severe as to have prevented the employment of another to make demand.⁴ It has been suggested

¹ *Jex v. Tureaud*, 19 La. Ann. 64; *Wilson v. Senier*, 14 Wis. 380.

² *White v. Stoddard*, 11 Gray, 258.

³ *Duggan v. King*, 1 Rice, 239.

⁴ *Wilson v. Senier*, 14 Wis. 380. The notice should be given as soon as a recovery is had, just as in all other cases; such as when an epi-

demic exists or a state of war, preventing demand, the presentation should be made as soon as practicable after the removal of the obstacle to demand. See *Harp v. Kenner*, 19 La. Ann. 63, where the delay was about six months and was unreasonable.

in the last case cited that the sickness must have been also sudden, but this is to be taken to mean simply that a man who has been guilty of a want of diligence, when he was not too sick to take thought of his business affairs, cannot justify the delay by the fact that he afterwards became incapacitated. It certainly cannot mean that a man who is ill is bound to anticipate that he will become worse. A like rule ought to be applied to the illness of the holder's agent, such as a notary; but so far as the cases show, notaries public are a remarkably healthy and vigorous set of public officials.

In case of death of the obligor or party to whom presentment should be made, the general rule is that presentment should be made to the personal representative of the deceased where the death is known to the holder.⁵ A diligent search should be made in the proper places to ascertain the personal representative.⁶ If no personal representative can be found after such diligent search, the presentment, it seems, ought not to be delayed awaiting the appointment of a personal representative,⁷ but should be made on the widow⁸ or perhaps upon some member of the family⁹ at the late residence of the deceased.¹⁰ But it may well be that the house may be closed up and no one there; in such case demand is not necessary, the paper is dishonored, and notice should be given accordingly.¹¹ One court, which seems to have supposed that delicacy or even common decency has no part in the law, has held that the demand should be made at the dwelling-house even on the day of the deceased's death, or, we may

⁵ Blake v. McMillan, 33 Iowa, 150.

⁶ Gower v. Moore, 25 Me. 16; Frayzer v. Dameron, 6 Mo. App. 153. *Contra*, Hale v. Burr, 12 Mass. 86. See Burrill v. Smith, 7 Pick. 291, where no demand could be made.

⁷ Huff v. Ashcroft, 1 Disn. 277; Price v. Young, 1 Nott & McC. 438.

⁸ Bank of Washington v. Reynolds, 2 Cranch, C. C. 289. But burden is

on the indorser to show that there was a personal representative. One course to pursue would be for the creditor to have an administrator appointed, but that cannot be considered necessary.

⁹ See cases in note 7. And see Juniata Bank v. Hale, 16 S. & R. 157; Johnson v. Harth, 1 Bailey, 482.

¹⁰ See cases in note 7 and 8, *supra*.

¹¹ Haslett v. Kunhardt, 1 Rice, 189.

suppose, of the funeral.¹² If authority were required for such a ruling it could only be found in a misapplication of the Scriptural injunction that it is better to go to the house of mourning than to the house of feasting. If the demand is made upon the personal representative, it seems that it must be a demand of payment and not a presentation of the paper as a claim for allowance;¹³ yet how the administrator can pay the paper without allowance is problematical, to say the least of it. It has been held that if the note was indorsed after the death of the maker, no demand is necessary as to the indorser;¹⁴ and there was once, for a short time, authority for saying that if the personal representative is the indorser, no demand is necessary to charge him as indorser,¹⁵ but the contrary rule is established. Such a fact might perhaps excuse notice of dishonor to himself if he were both indorser and executor,¹⁶ but not a demand; but the decision upon the subject does not bear out this statement.

§ 258. Demand where place stipulated.—The paper may be made payable at a particular place by being expressly made so payable either in the paper or by parol agreement, and by naming a particular place, in the case of a bill of exchange, for presentment and payment, and by an acceptance payable at a particular place. To fall within the description of a particular place the place designated must be some particular counting room, place of business, office, or business

¹² *Huff v. Ashcroft*, 1 Disn. 277. *Stover, J.* (see his decision at 1 Disn. 60), seems to have had the decency of feeling which the other judges lacked.

¹³ *Chase v. Evoy*, 49 Cal. 467. This decision is a curious one. If the demand be made on the personal representative, it can only be to allow the claim; he has no authority to do anything else. Payment is incidental to the allowance of the claim. See *Pickler v. Harlan*, 75 Mo. 678.

¹⁴ *Davis v. Francisco*, 11 Mo. 572. See *Pickler v. Harlan*, 75 Mo. 678.

¹⁵ *Magruder v. Union Bank*, 2 Cranch, C. C. 687 (reversed, 3 Pet. 87). See *Groth v. Gyger*, 31 Pa. 271, and *Alton v. Robinson*, 2 Humph. 341.

¹⁶ But *Schumacher v. Quaritius*, 5 Red. Sur. 251, is *contra* as to demand, where the holder was executor of the indorser. A demand was necessary. See the last note.

house.¹ The mere designation of some town or city is not a designation of a particular place. It is possible, through inadvertence or ignorance, that the place designated might be one of the large modern office buildings. Such buildings contain frequently as many business places as ordinary small towns. What construction would be put upon such a stipulation is not easy to determine. The reasonable construction would be that if the person to whom presentment was to be made had an office or place of business in the building, the stipulation would be construed to mean that office, on account of the ease with which the office could be ascertained; but if he had not at the time of making the paper, then the stipulation would mean no more than if the city generally were designated. Again, it has sometimes happened or has been a custom that paper should be made payable at any bank or at more than one particular place in a city. Such a stipulation justifies, it seems, a presentment at any bank in the city, if the stipulation is for any bank, or at either of the places named, if more than one place be named.² The holder is not required to give the party any notice that he has selected either of the places for payment;³ but if he does give such

¹ *Montross v. Doak*, 7 Rob. (La.) 170. The designation of the house of the drawee is nothing more than surplusage. It means nothing as to demand. *Frost v. Stoke*, 55 N. Y. Super. Ct. 76. But it seems that in one state the practice of the parties to the paper can control the written stipulation as to the place of payment. Thus where the paper designated a particular place of payment, but payments of interest were received at another place continuously for some length of time before payment could be demanded at the place designated, it was held that notice of the change to the place designated in the paper should be given. *Rounsavell v. Crofott*, 4

Bradw. 671. The decision is a misguided but well-meant attempt to do substantial justice.

² *Langley v. Palmer*, 30 Me. 467; *Allen v. Avery*, 47 Me. 287; *Brickett v. Spaulding*, 33 Vt. 107; *Malden Bank v. Baldwin*, 13 Gray, 154; *Boit v. Corr*, 54 Ala. 112. *Contra*, *North Bank v. Abbott*, 13 Pick. 465, overruled.

³ See cases cited, and *Page v. Webster*, 15 Me. 249. Compare *Cecil Nat. Bank v. Holt*, 7 Pa. Co. Ct. R. 485. A private banker is not a banker, it seems, under the rule (*Way v. Butterworth*, 106 Mass. 75), nor a trust company (*Nash v. Brown*, 165 Mass. 384), without evidence of a custom to so treat it under this rule.

notice he will be bound by his notice,⁴ and the other parties to the paper will be bound by the notice.⁵

Where a particular place is designated as the place of payment it negatives all other places, and presentment is not required at any other place.⁶ And it makes no difference whether the place be an office, counting room or bank, the rule is the same.⁷ The stipulation obviates the necessity for any personal demand,⁸ or any demand at the office, business house, or residence⁹ of the party upon whom demand is to be made. Where the place stipulated for is a bank, it is a sufficient demand for the holder to be at the bank, ready to receive payment, or to leave the paper at the bank for collection prior to the maturity, or so that it be there at the date of maturity.¹⁰ But it has been wrongly held that if the

⁴ *Pearson v. Bank of Metropolis*, 1 Pet. 89, in principle; *State Bank v. Hurd*, 12 Mass. 172; *Whitwell v. Johnson*, 17 Mass. 449, and *Meyer v. Hibsher*, 47 N. Y. 265, state the general rule as to fixing a place of payment by parol. And see *North Bank v. Abbott*, 13 Pick. 465.

⁵ This ought to be the rule under such a provision in the paper, since it is really for the benefit of all parties that the place should be fixed. But a notice upon paper, not payable at a particular place, that it has been left at a certain place for payment, is not a demand. *Barnes v. Vaughan*, 6 R. I. 259, refusing to follow the Massachusetts rule.

⁶ *Shaw v. Reed*, 12 Pick. 132; *Aperson v. Bynum*, 5 Cold. 341; *Bank of State v. Bank of Cape Fear*, 13 Ired. 75; *Lawrence v. Dobyons*, 30 Mo. 196; *Moore v. Britton*, 22 La. Ann. 64; *Wild v. Van Valkenburgh*, 7 Cal. 166. But see *Herring v. Sanger*, 3 Johns. Cas. 71; *Rounsavell v. Crofott*, 4 Bradw. 671.

⁷ *Goodloe v. Godley*, 13 Smedes &

M. 233; *Woodin v. Foster*, 16 Barb. 146.

⁸ *Bank of U. S. v. Carneal*, 2 Pet. 543; *Eason v. Isbell*, 42 Ala. 456; *Townsend v. Heer Dry Goods Co.*, 85 Mo. 503; *Guignon v. Trust Co.*, 156 Ill. 135; *Bank of Metropolis v. Brant*, 2 Cranch, C. C. 530; *Bank of U. S. v. O'Neale*, 2 Cranch, C. C. 466.

⁹ *Barker v. Fullerton*, 11 La. Ann. 25; *People's Bank v. Keech*, 26 Md. 521; *Jenks v. Doylestown Bank*, 4 Watts & S. 505.

¹⁰ *Rahm v. Philadelphia Bank*, 1 Rawle, 335; *Britton v. Doylestown Bank*, 5 Watts & S. 87; *Hallowell v. Curry*, 41 Pa. 322; *Ogden v. Dobbin*, 2 N. Y. Super. Ct. 112; *State Bank v. Napier*, 6 Humph. 270; *Bank of U. S. v. Carneal*, 2 Pet. 543; *Merchants' Bank v. Elderkill*, 25 N. Y. 178; *Remington v. Harrington*, 8 Ohio, 507. It is certain the demand is sufficient if the note is at the bank for collection. But suppose the note is not there at maturity, and the maker does not come there to pay, and makes no deposit

paper be there for collection, but the fact be unknown to the bank officers, there is no sufficient demand.¹¹ Referring again to the hour of demand, we will not repeat what has been already said as to the hour of demand, where the place of payment is an office or bank.¹² As we have seen, also, the acceptor may make his acceptance payable at a particular place, and demand at that place is all that is required.¹³ If the bill is addressed to the drawer at a certain place and is accepted generally, a demand at that place of address is sufficient, unless the holder knows that it is a wrong address or could have so learned while he was presenting the bill.¹⁴ The converse of the preceding rules is also settled, and therefore, if the place of payment be designated in any of the ways indicated heretofore, demand to hold an indorser or drawer must be made at that particular place.¹⁵

A misnomer of the particular place that does not mislead does not vitiate in any way the binding force of the stipulation.¹⁶ But it may happen that the particular bank or counting-room or place of business has ceased to exist or is closed. Yet it seems that a demand there is sufficient;¹⁷

or has no deposit there to pay the note, he, of course, is not released. *Dockray v. Dunn*, 37 Me. 442; *Carter v. Smith*, 9 Cush. 321; *Nichols v. Pool*, 47 N. C. 23. But need a sufficient demand be shown as against the indorser? The authority is that it must. *Nichols v. Pool*, 47 N. C. 23; *Shaw v. Reed*, 12 Pick. 132; *Magoun v. Walker*, 49 Me. 419; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528; *Middleton v. Boston Loco. Works*, 26 Pa. 257. In the absence of proof the note will be presumed to be at the bank. *Folger v. Chase*, 18 Pick. 63.

¹¹ *Chicopee Bank v. Philadelphia Bank*, 8 Wall. 641. The decision was made in a case where the bill had slipped into a drawer for waste papers in the cashier's desk. It was

an acceptance, and the acceptors were insolvent at maturity. The suit was by the holders against the collecting bank for damages.

¹² See § 250, *ante*.

¹³ See § 233, *ante*, note 2.

¹⁴ *Struthers v. Kendall*, 41 Pa. 214; *Pierce v. Struthers*, 27 Pa. 249. But the qualification in the last case is wrong. A demand at such place is all that is necessary. *McClane v. Fitch*, 4 B. Mon. 599.

¹⁵ See cases cited in note 10, *supra*, and *Smith v. McLean*, 4 N. C. 509, and § 233, *ante*, note 2.

¹⁶ *Powell v. State Bank*, 1 Disney, 260; *Worley v. Waldron*, 3 Sneed, 548.

¹⁷ *Central Bank v. Allen*, 16 Me. 41; *Spann v. Baltzell*, 1 Branch, 301; *Roberts v. Mason*, 1 Ala. 373. But

but it is doubtful on the authorities whether it would be necessary. The rule ought to be that if the bank is closed and out of business, no demand at all is necessary. A personal demand, however, under such circumstances ought to be considered proper. The place of business may be occupied by the successor of the particular business house or bank caused by its merger with another business. A demand at the place would still be sufficient.¹⁸ If another bank is occupying the premises designated, demand upon it is good;¹⁹ but a better rule would be that if the bank were named as a place of payment, and were still in business in the same city, the name of the bank would control the premises where it did business. If there be another bank, not necessarily at the same premises, which is closing up the affairs of the bank designated, a demand at such bank would be good.²⁰ There is some authority, too, for the statement that if the paper is "negotiable" at a particular bank, where nothing is said as to the place of payment, it is equivalent to the statement that the paper is payable at that bank,²¹ and there is authority to the contrary.²² The second rule stated is the better one. The place of payment designated need not appear on the paper. It is sufficient if the parties agree upon it;²³ but such an agreement between maker and holder, or drawer and holder, could hardly be binding on an indorser;²⁴ yet, as between acceptor and holder, the

Purcell v. Allemon, 22 Gratt. 739, holds that if the bank has been removed, notice of that fact must be given to the drawer.

¹⁸ *Sanderson v. Oakley*, 14 La. 373; *Roberts v. Mason*, 1 Ala. 373; but not necessary, it seems.

¹⁹ *Faulkner v. Faulkner*, 73 Mo. 327; *Lane v. Bank of West Tennessee*, 9 Heisk. 419.

²⁰ *Roberts v. Mason*, 1 Ala. 373; *Gelpecke v. Lovell*, 18 Iowa, 17.

²¹ A reference to a case has been lost by the author, but there is one such decision.

²² *Beeding v. Thornton*, 3 Cranch, C. C. 698. But if the note is negotiable at another bank than where it is payable, the bank where negotiated is not made the place for demand. *Watkins v. Crouch*, 5 Leigh, 522.

²³ *Pearson v. Bank of Metropolis*, 1 Pet. 89; *State Bank v. Hurd*, 12 Mass. 172; *Whitwell v. Johnson*, 17 Mass. 449; *Meyer v. Hibsher*, 47 N. Y. 265; *Apperson v. Bynum*, 5 Cold. 341.

²⁴ *Meyer v. Hibsher*, 47 N. Y. 265; *Smith v. McLean*, 4 N. C. 509, where

agreement binds the drawer and indorser.²⁵ But if the indorser of the note puts upon it the maker's residence, when he indorses, or, on principle, at any other time, he ought to be bound by a demand at that place,²⁶ unless the holder ascertains or ought to have ascertained that the address was a mistake, or unless the maker had changed his residence afterward to the knowledge, actual or imputed, of the holder. Where the place of demand is provided for as herein stated, presentation there is sufficient whether the person upon whom demand is to be made is found there or not.²⁷ But it should be remembered that if demand is made at a bank it must be during business hours, or if thereafter upon some officer competent to answer while in the bank,²⁸ and if at any other business house it must be during business hours.²⁹

§ 259. Demand where no place stipulated.—Where the paper itself does not provide for the place of its presentation, as explained in the preceding section, the general rule is that the demand must be a personal demand. This personal service of a demand may be actual or constructive. If it is actually personal, it is made wherever the person upon whom the demand is made may be found. It is immaterial where this may be, whether at his office or place of business;¹ at his residence;² or upon the street, if not objected to;³ and it is immaterial at what time the demand is made, provided it

the agreement dispensed with the place designated in the paper. See *Herring v. Sanger*, 3 Johns. Cas. 71, and *Nugent v. Mazange*, 2 Mart. (O. S.) 264.

²⁵ See § 233, *ante*, note 2, and notes 14 and 15, *supra*.

²⁶ *Farnsworth v. Mullen*, 164 Mass. 112; *Nugent v. Mazange*, 2 Mart. (O. S.) 264. The limitation is made on the authority of a similar principle. *Pierce v. Struthers*, 27 Pa. 249.

²⁷ See cases in notes 8 and 9, *supra*.

²⁸ See § 250, *ante*.

²⁹ See § 250, *ante*.

¹ See cases in note 5, *infra*.

² See cases in note 5, *infra*.

³ *King v. Crowell*, 61. Me. 244; *Townsend v. Heer Dry Goods Co.*, 85 Mo. 503; *Parker v. Kellogg*, 158 Mass. 90 (the demand was not objected to); but *King v. Holmes*, 11 Pa. 456, holds the demand not good if the person had a place of business. A barnyard may be considered a proper place for demand, no objection being made. *Baldwin v. Farnsworth*, 10 Me. 414.

be at some reasonable hour;⁴ but this proposition is disputed. But the demand, where it is not actually personal, but merely constructively so, is the one that causes the most difficulty. The person making the demand may know or may not know the residence or place of business of the party upon whom a demand is to be made. The most general proposition that may be advanced, assuming the demandant to know the facts, is that the person making the demand, where no place of demand is provided for, may select either the place of business or the residence, if the maker, drawee or acceptor, as the case may be, has both a residence and a place of business.⁵ And a good demand at either place is sufficient; the demandant is not required to resort to the residence if he does not find the party at his place of business, or *vice versa*.⁶ But if the party has a place of business the preferable practice will be to make the demand at that place, whether it be an office or a business house. The demand should be made during business hours if the party be not found there; otherwise a demand there is not good.⁷ If business hours are over and the place of business closed, or the party not therein, the alternative remaining is to resort to the resi-

⁴ See § 250, *ante*.

⁵ *Bateson v. Clark*, 37 Mo. 31; *Winans v. Davis*, 18 N. J. Law, 276; *Otsego Co. Bank v. Warren*, 18 Barb. 290 (a partnership); *Arnold v. Dresser*, 90 Mass. 435; *Estes v. Tower*, 102 Mass. 65; *Barnes v. Vaughan*, 6 R. I. 259; *Burrows v. Hannegan*, 1 McLean, 309; *Hartford Bank v. Greene*, 11 Iowa, 476; *People's Nat. Bank v. Luttertohl*, 95 N. C. 495; *Holtz v. Boppe*, 37 N. Y. 634; *Adams v. Leland*, 30 N. Y. 309; *Simmons v. Belt*, 35 Mo. 461.

⁶ At place of business sufficient. *Wallace v. Crilley*, 46 Wis. 577; *Wiseman v. Chiapella*, 23 How. 368; *Shedd v. Brett*, 1 Pick. 413; *Baumgardner v. Reeves*, 35 Pa. 250;

Fields v. Mallet, 10 N. C. 465 (but in this case the indorser said the maker was not at home). At residence sufficient. *Wiseman v. Chiapella*, 23 How. 368. See the cases in note 5, *supra*, and *Ashton v. Dull*, 31 Leg. Int. 61. But if the place of business is abandoned, the residence must be sought for. *Granite Bank v. Ayres*, 16 Pick. 392. See *Demond v. Burnham*, 133 Mass. 339. *Goldsborough v. Jones*, 2 Cranch, C. C. 305, holds that if the maker is absent from his place of employment during business hours, demand must be made at his dwelling-house. The decision was a very palpable blunder.

⁷ See § 250, *ante*.

dence.⁸ The preliminary question to be determined in serving at a place of business is whether or no it be the party's place of business. If the place has been his place of business, but is abandoned, the demand should be made at the residence.⁹ So it seems to have been held where the makers had failed and an assignee was in possession.¹⁰ If the party has led the public to suppose that he has a place of business, that place will be considered his place of business for a demand.¹¹ A comparison of cases upon the subject of service of notice of non-payment will be found instructive¹² as to determining what is a place of business. If the demand is made at the place of business during business hours, the place of business may be closed. If so, the demand is complete and the paper is dishonored, just as it is dishonored if the residence is closed.¹³ But in the latter contingency the rule ought to be that if the person has a well-known place of business in the city where he resides, a demand should be made there if the residence is closed. If there be some one in the place of business, if he states that he is the person named his answer may be relied upon.¹⁴ If the person wanted is not there, demand should be made upon the clerk or one apparently in charge, and it will be sufficient. If the place of business is open, but no one there, the author's opinion is that the situation is the same as if the office were closed. Certainly, after waiting a reasonable time, a written demand left there designating some place to come and pay ought, in common sense, to be sufficient; but it has been held that a notification to a party to come to a certain

⁸ See notes 5 and 6, *supra*.

⁹ *Granite Bank v. Ayres*, 16 Pick. 392. Compare *Demand v. Burnham*, 133 Mass. 339, and *Talbot v. Nat. Bank of Com.*, 129 Mass. 67.

¹⁰ *Benedict v. Caffé*, 5 Duer, 226.

¹¹ *McHenry v. Kellar*, 6 La. Ann. 326.

¹² See §§ 274, 280, *post*.

¹³ *Baumgardner v. Reeves*, 35 Pa. 250; *Shedd v. Brett*, 1 Pick. 413 (for

place of business); *Wiseman v. Chiappella*, 23 How. 368 (for residence). But compare *Bank of Red Oak v. Orvis*, 42 Iowa, 691; *Apperson v. Bynum*, 5 Cold. 341.

¹⁴ *Hunt v. Maybee*, 7 N. Y. 266. And for the propriety of making a demand upon the clerk or other person in the office, see § 248, *ante*, notes 19-24.

place and pay a note was not a sufficient demand,¹⁵ but it did not appear in that case that any attempt at an actual demand had been made. Certainly the person ought not to be expected to wait an unreasonable length of time until some one came in, and if necessary to wait until business hours were over. Caution probably would dictate a search for the residence of the party. But it is not infrequently the case with men of business in large cities that their residences are many miles away and a demand there would be impracticable. Therefore the rule ought to be that, if a demandant goes to an office or place of business of a party and, finding no one there, leaves a notice in some proper place in the office, as upon the desk of the party, if he can determine it, such a demand is sufficient. It is certainly sufficient in any place where the custom obtains and is so general that every one is supposed to have knowledge of it. But it may be that the person upon whom the demand is to be made has no place of business. In that case his residence must be sought and a demand made there. The law applicable to a demand at the residence is the same for whatever reason the demand is made there, whether it be because the demandant chooses the residence because he prefers it to the place of business,¹⁶ or because it is too late to make demand at the place of business, or because there is no place of business,¹⁷ or because the residence is designated as the place of payment. In this latter case it is to be observed that the designation of the dwelling-house of the party upon whom demand is to be made as the place of payment amounts to nothing more than a giving on the paper of the place of residence. The demand nevertheless can be made at the person's place of business, if he has one.¹⁸ The ques-

¹⁵ Barnes v. Vaughan, 6 R. L. 259. And see Farmers' Bank v. Duvall, 7 Gill & J. 78. Banks are permitted to do this by a custom in New England. Whitwell v. Johnson, 17 Mass. 449. The best commentary upon this rule is the note 6 to this

case by the editor of the edition of 1864. Benjamin Rand, Esq.

¹⁶ See note 6, *ante*, as to this right.

¹⁷ Bank of Red Oak v. Orvis, 42 Iowa, 691; Apperson v. Bynum, 5 Cold. 341.

¹⁸ Frost v. Stokes, 55 N. Y. Super.

tion of residence must be determined preliminarily. A man may be fortunate enough to have two residences, a town house and a country house. If the city house is kept open or has some one in charge competent to receive the demand, such as a servant, or even if it be shut up, the demand made there upon such person is good.¹⁹ If the place is closed up and no one there, a search showing due diligence must be made to ascertain the present residence of the person sought.²⁰ If the new place of business or present residence of the party is found to be in another state, demand ought to be made at the former residence or place of business,²¹ although this cannot be considered necessary.

If the residence is occupied by the party, family or servants, demand may be made there although the person sought is temporarily absent.²² The time of demand must be within reasonable hours, but what they are has not been accurately determined.²³ If the residence is no longer occupied by him but by some one else, further search must be made for his residence, in accordance with the rules as to reasonable diligence. It is to be noted that in questions of demand, the holder, if he employs an agent, must give the agent all the information which he possesses, for it must be shown not only that the agent exercised due diligence, but that the holder did also.²⁴ But it is a reasonable qualification to this

Ct. 76; *Miller v. Henner*, 3 Mart. (N. S.) 587. The demand may be made at the place of business as well.

¹⁹ *Stewart v. Eden*, 2 Caines, 121 (a case as to notice). See *Goodwin v. McCoy*, 13 Ala. 271, and *Runyon v. Montfort*, 44 N. C. 371, which were also cases as to notice.

²⁰ *Stayler v. Ball*, 24 Md. 183. If known, demand must be there. *La. Ins. Co. v. Shamburgh*, 2 Mart. (N. S.) 511.

²¹ *Adams v. Leland*, 30 N. Y. 309; *Central Bank v. Allen*, 16 Me. 41. A removal to a new state excuses a demand. *Magruder v. Bank of*

Washington, 9 Wheat. 598; *Gist v. Lybrand*, 3 Ohio, 307; *Wheeler v. Field*, 6 Met. 290; *Grafton Bank v. Cox*, 13 Gray, 503; *Sanford v. Norton*, 17 Vt. 285; *Herrick v. Baldwin*, 17 Minn. 209; *Foster v. Julien*, 24 N. Y. 28. But not if the removal is in the same state. *Bigelow v. Keller*, 6 La. Ann. 59; *Reinke v. Wright*, 93 Wis. 368.

²² *Levy v. Drew*, 14 Ark. 334. See *Shamburgh v. Commagere*, 10 Mart. (O. S.) 18; *Farley v. Hewson*, 10 La. Ann. 783.

²³ See § 250, *ante*.

²⁴ *Haly v. Brown*, 5 Pa. 178.

statement that the holder is to be considered any person or corporation which has the paper indorsed to it or transferred to it, though solely for collection;²⁵ and such a holder is not an agent in the sense that the person who transfers must communicate his knowledge as to the residence of the person upon whom demand is to be made, although reasonable diligence may require an inquiry to be made of such transferor or indorser. The demandant must take notice, of course, of addresses upon the paper itself.²⁶

§ 260. Demand where residence or place of business unknown.— If the person sought for is not known to the holder to have a residence or place of business, various contingencies may arise. Thus, the city or town where he resides may be known or it may not be known. If the city or town or other locality be known to the holder or be ascertained, or if a former residence or place of business be known, an earnest attempt should be made to ascertain either his residence or his place of business. The sufficiency of this attempt is always a question of reasonable diligence under the circumstances.¹ There are various cautions to be suggested, such as a consultation of the directory,² inquiries at the postoffice,³ inquiries in the neighborhood of the former residence or place of business,⁴ inquiry at these latter places.⁵ A number of cases will be found in the notes upon this subject, and the authorities upon the subject of notice should be consulted.⁶ There are certain presumptions that may be

²⁵ This is the rule as to notice. *Bartlett v. Isbell*, 31 Conn. 296.

²⁶ *Nicholson v. Barnes*, 11 Neb. 452. The change in the address of the maker made by the indorser upon transferring is binding upon him. *Nugent v. Mazange*, 2 Mart. (O. S.) 264.

¹ *Holtz v. Boppe*, 37 N. Y. 634; *Taylor v. Snyder*, 3 Denio, 145.

² *Tate v. Sullivan*, 30 Md. 464; *Jarvis v. Garnett*, 39 Mo. 268. See *Packard v. Lyon*, 5 Duer, 82. But

this is sometimes not necessary (*Holtz v. Boppe*, 37 N. Y. 634), if the removal be recent.

³ *Tate v. Sullivan*, 30 Md. 464.

⁴ *Ellis v. Commercial Bank*, 7 How. (Miss.) 294.

⁵ *Paton v. Lent*, 4 Duer, 231; *Peet v. Zanders*, 6 La. Ann. 364. Inquiry of other parties to the paper. *Packard v. Lyon*, 5 Duer, 82.

⁶ *Spencer v. Bank of Salina*, 3 Hill, 520; *Bank of Utica v. Phillips*, 3 Wend. 408; *Farnsworth v. Mul-*

indulged, such as that the place of the making of a note is presumably the place where the maker resides, unless the note is dated at some other place, when the presumption is that the maker resides there.⁷ Some courts hold that nothing as to the residence of the maker appearing, a presentment for payment at the place of date of the note is sufficient.⁸ But this does not mean that the holder is absolved from due diligence in inquiring as to the residence of the maker.⁹ If the maker reside in another state, a demand at the place of execution has been held sufficient,¹⁰ but this rule is not true stated in this way.¹¹ It is true, however, where after execution the maker has removed to another state.¹² In such a case a demand at the former residence is sufficient.¹³ The residence known or stated in the note of the drawee is, without doubt, the proper place to make a demand,¹⁴ as we have seen, and if the bill is drawn and dated at the business domi-

len, 164 Mass. 112; *Tarlton v. Miller*, 1 Ill. 39. In order to understand this decision it would be well to consult the preface to the report, which apologizes for the decisions therein by saying that the judges had no library, were compelled to perform circuit court duties and to act as a part of the council of revision. And see §§ 280 and 281, *post*.

⁷ *Herrick v. Baldwin*, 17 Minn. 209.

⁸ *White v. Wilkinson*, 10 La. Ann. 394; *Smith v. Philbrick*, 10 Gray, 252. But see *Hart v. Wills*, 52 Iowa, 56. A bill made and dated at the business domicile of the drawer is payable there, wherever it be negotiated. *Ex parte Heidelberg*, 2 Low. 526.

⁹ *Galpin v. Hard*, 3 McCord, 394; *Mason v. Pritchard*, 9 Heisk. 793; *Haber v. Brown*, 101 Cal. 445; *Oxnard v. Varnum*, 111 Pa. 193. See *Burrows v. Hannegan*, 1 McLean, 309.

¹⁰ *Hepburn v. Toledano*, 10 Mart.

(O.S.) 643. See note 21 to last section, and note 13, *supra*.

¹¹ If the person dated the note in a state where he had no residence, a demand in the state of date is permissible, if diligence to find the address is used.

¹² See cases cited in note 21 to last section. Demand is then excused altogether.

¹³ See cases cited in note 21 to last section. But *Taylor v. Snyder*, 3 Denio, 145, shows what the rule is where the maker resides in another state at the time of the making of the note. Demand upon him is not excused, and, if his residence is known, demand must be made upon him at his place of domicile. *Mason v. Pritchard*, 9 Heisk. 793.

¹⁴ *Glaser v. Rounds*, 16 R. I. 235; *Nicholson v. Barnes*, 11 Neb. 452. If the holder has reason to think he knows the residence, he is not negligent for failing to make in-

cile of the drawee it is payable there, although it may have been negotiated elsewhere.¹⁵ Where no result is attained by reasonable diligence in inquiring, the bill is dishonored and notice must be given.¹⁶ If the holder or his agent after inquiring, or from the paper itself, believes in good faith that he has ascertained the place of residence of the party¹⁷ or his place of business, he is not wanting in diligence if he acts upon his knowledge and makes demand accordingly.¹⁸ Where a demand is made upon a personal representative after death of the party liable, the demand as to place is governed by the foregoing rules.¹⁹

§ 261. Customs and usages upon demand.—General business customs of notoriety are presumed to be known to the business community.¹ Such a custom not to do business on particular days has made Harvard commencement day a holiday in a portion of Massachusetts;² but a custom not to do business on New Year's day must be brought home to a party by actual or constructive knowledge.³ The half-holiday on Saturday may become another instance of such business usage.⁴ Again, upon notes made payable or negotiable at a bank, the usages of that bank are a part of the contract; such as to demand payment on the fourth day of grace,⁵ or to send notes for collection in packages once a week,⁶ or to allow days of grace

quiries. *Bank of Utica v. Phillips*, 3 Wend. 408.

¹⁵ *Ex parte Heidelback*, 2 Low. 526.

¹⁶ *Wolf v. Jewett*, 10 La. 384.

¹⁷ *Farnsworth v. Mullen*, 164 Mass. 112.

¹⁸ See also *Bank of Utica v. Phillips*, 3 Wend. 408 (as to notice).

¹⁹ See § 257, *ante*.

¹ See §§ 113–117, *ante*.

² *City Bank v. Cutter*, 3 Pick. 414.

³ *Dabney v. Campbell*, 9 Humph. 680. This decision is wrong. The custom was notorious.

⁴ But the cases are on statutes.

See *Sylvester v. Crohan*, 138 N. Y. 494.

⁵ *Renner v. Bank of Columbia*, 9 Wheat. 581; *Mills v. Bank of U. S.*, 11 Wheat. 431; *Bank of Washington v. Triplett*, 1 Pet. 25. *Contra*, custom does not bind an indorser unless he knows of it. *Pierce v. Butler*, 14 Mass. 303. But see *Blanchard v. Hilliard*, 11 Mass. 85; *Whitwell v. Johnson*, 17 Mass. 449. The rule does not apply without knowledge as to note merely left there for collection. *Hill v. Norvel*, 3 McLean, 583.

⁶ *Bridgeport Bank v. Dyer*, 19 Conn. 136.

on post-dated checks where the law of the jurisdiction does not forbid, but would not otherwise allow them,⁷ or to allow a demand upon a note due upon Sunday upon Monday;⁸ but the proof of a custom to allow demand on Monday, where the customary fourth day of grace fell upon Sunday, failed in another case, but the case impliedly holds that such a custom would be valid.⁹ But a custom contrary to express statute is not good, such as not to allow days of grace upon a post-dated check,¹⁰ though in the same case proof was allowed of a contrary rule of law in a foreign jurisdiction;¹¹ and a custom not to allow days of grace upon bankable paper of any kind,¹² or upon a bank's post-notes,¹³ has been held invalid as contrary to law where the statutory law gave days of grace. The true rule is that, where days of grace are merely given as a part of the law merchant, a custom may destroy them, because the parties may waive them, as they do by agreeing to the custom; but where days of grace are settled by a statute, the custom cannot abolish them, because the parties themselves will not be held to have waived the statute, even if they could do so, except by an express agreement. A usage to give notice to the maker of the maturity of the note and the place where it is deposited for collection cannot be substituted for a demand so as to bind an indorser,¹⁴ but in other jurisdictions the custom has been allowed to prevail.¹⁵ Other courts have held that the custom of a bank, to be binding upon a party to the

⁷ Bowen v. Newell, 13 N. Y. 290.

⁸ Patriotic Bank v. Farmers' Bank, 2 Cranch, C. C. 560.

⁹ Adams v. Otterback, 15 How. 539.

¹⁰ Bowen v. Newell, 8 N. Y. 190; Woodruff v. Merchants' Bank, 25 Wend. 673, 6 Hill, 174. For the principle see Otsego Co. Bank v. Warren, 18 Barb. 290.

¹¹ Bowen v. Newell, 13 N. Y. 290.

¹² Morrison v. Bailey, 5 Ohio St. 13.

¹³ Mechanics' Bank v. Merchants' Bank, 6 Met. 13.

¹⁴ Barnes v. Vaughn, 6 R. I. 259; Moore v. Waitt, 13 N. H. 415. And see Farmers' Bank v. Duvall, 7 Gill & J. 78. So of a usage to take a check in payment of a collection by the collecting bank, and to protest the collection if the check should be dishonored. Strong v. King, 35 Ill. 9.

¹⁵ Whitwell v. Johnson, 17 Mass. 449.

paper, must have been known to him, even though the paper was made payable at the particular bank.¹⁶ But under no circumstances ought a custom varying from the law to be permitted on paper not payable at the bank, unless he had actual notice of the custom¹⁷ or such constructive notice as would amount to actual notice.¹⁸

§ 262. Excuses for failure to make demand.—We have already considered the excuse of ignorance of the address of the person to whom presentment for payment is to be made as a defense, when due diligence has been used in searching for the address;¹ and the excuse of a prior presentment for acceptance and the refusal of acceptance;² and the excuse of no injury done to the drawer of the check³ or of a non-negotiable order⁴ by the failure to make a demand; and the excusing of demand as to a guarantor or a party who stands in relation to the paper as a guarantor,⁵ and the excusing of demand as to forged paper;⁶ paper that has been fraudulently transferred to the holder will be considered in this section; and the cases already considered where no demand is necessary⁷ may be considered in the light of excuses for failure to make demand. There are other matters which have been urged as excusing a demand, such as the insolvency of the drawee or maker, the want of funds of the drawer in the hands of the drawee, a change of residence on the part of the drawee or maker, an absconding of the drawee or maker, the existence of a pestilence or the prevalence of a malignant disease, and the interruption of commercial intercourse by a state of war. These various conditions of fact will be considered in the succeeding sections. There are cer-

¹⁶ *Bank of Alexandria v. Deneale*, 2 Cranch, C. C. 488 (no longer authority); *Moore v. Waitt*, 13 N. H. 415.

¹⁷ *Bridgeport Bank v. Dyer*, 19 Conn. 136; *Marrett v. Brackett*, 60 Me. 524.

¹⁸ *Citizens' Bank v. Graffin*, 31 Md. 507. See also *Bank of U. S. v. Norwood*, 1 Har. & J. 423; *Jones v.*

Fales, 4 Mass. 245; *North Bank v. Abbott*, 13 Pick. 465.

¹ See § 260, *ante*.

² See § 233, *ante*.

³ See § 237, *ante*.

⁴ See § 242, *ante*.

⁵ See § 241, *ante*.

⁶ See § 244, *ante*.

⁷ See § 260, *ante*, notes 8 to 16.

tain miscellaneous excuses which will be grouped together here. In some instances a demand has been dispensed with by statute.⁸ Where the indorser has discharged the maker of the note no demand is necessary upon the maker⁹ for reasons that are obvious. In another case showing a peculiar situation, the distance, the inclemency of the season and the lateness of the hour were held to be an excuse for not demanding payment.¹⁰ But the infancy of the maker is no excuse for failure to demand payment from him.¹¹ The fact that suit was pending on the note at maturity or at the date of its transfer is no excuse for want of demand,¹² but the ruling as to a suit pending at maturity will not bear scrutiny; it is certainly a wrong decision. In another case the depreciation of money was considered to justify a failure to make demand;¹³ and where an injunction had been served upon a bank suspending its business, the fact was necessarily an excuse for a failure to present a check upon the bank for payment.¹⁴ The intimation is that if due diligence were not used in presenting the check before the injunction was granted, the drawer would have been released if he had funds in the bank. It should be remembered that in no case can a suit be brought against the drawer upon the check, unless

⁸ Upon notes, except those payable at a bank. *Hoadley v. Bliss*, 9 Ga. 303; *Cothran v. Cunningham*, 28 Ga. 177. The statute applied to paper payable at private banks. *Banks v. Bessler*, 56 Ga. 199. See *Falk v. Rothschild*, 61 Ga. 595, as to national banks. See also a private charter, *Central Bank v. Whitfield*, 1 Ga. 593; a general statute, *Pococke v. Blount*, 6 Mo. 338; *Snyder v. Gascoigne*, 11 Tex. 449.

⁹ *Burke v. McKay*, 2 How. 66.

¹⁰ *Farley v. Hewson*, 10 La. Ann. 783.

¹¹ *Wyman v. Adams*, 12 Cush. 210.

¹² *Grant v. Strutzel*, 53 Iowa, 712; *Bishop v. Dexter*, 2 Conn. 419. The second case is right because the in-

dorsement was after suit brought. But the first case is wrong because the note was in suit to the knowledge of the indorser when the note matured.

¹³ *Fowl v. Todd*, 1 Bay, 176. The absurdity of a currency that is worthless never received a more vivid commentary than in this case. The worthless currency was a legal tender. If the bills had been presented they would have been paid in worthless legal tenders. Hence the court achieved the unique distinction of holding that the holder need not present the bills, but should sue the drawer.

¹⁴ *Lovett v. Cromwell*, 6 Wend. 369.

a demand of payment has been made, or unless the demand is excused.¹⁵ Fraud in the indorser or usury in the note indorsed may under some circumstances dispense with notice as to the indorser. Thus where, by reason of the fraud of the indorser, no consideration passed to the indorsee,¹⁶ or where fraudulent representations were made as to the note which was indorsed in payment,¹⁷ or where the note was paid¹⁸ when indorsed, no demand as to the indorser is necessary. If the notes of a suspended bank are passed with a promise to take them back, or where they are passed fraudulently, no demand is needed as to the transferrer.¹⁹ The rule is the same where the indorser has prevented the necessary steps being taken to charge him; he is of course estopped to insist upon demand or notice.²⁰ But if the fraud is immaterial as to the maker as against a *bona fide* indorsee, demand and notice are said not to be excused.²¹

§ 263. Insolvency of maker or drawee.—The rule is settled that although the maker of a note has become absolutely and notoriously insolvent, a demand must be made upon him for the payment of the note.¹ This rule seems to be supported by no very sufficient reason, for (to quote a morsel of that species of ingenious Latinity which is the peculiar glory of the law) *lex non cogit ad vana* (the law does not require a vain and useless act). The indorser ought not to require such an act to be performed. But the law has been settled by very high authority,² although the decisions which so rule do not display any background of thought.

¹⁵ See § 149, *ante*, and § 349, *post*.

¹⁶ *Gee v. Williamson*, 1 Port. 313.

¹⁷ *Alexander v. Dennis*, 9 Port. 174.

¹⁸ *Bissell v. Bozman*, 2 Dev. Eq. 154.

¹⁹ *Hellings v. Hamilton*, 4 Watts & S. 462.

²⁰ *Bruce v. Lytle*, 13 Barb. 163; *Boyd v. Bank of Toledo*, 32 Ohio St. 526.

²¹ *Perkins v. White*, 36 Ohio St. 530. For usury see *Copp v. McDougall*, 9 Mass. 1.

¹ *Oliver v. Munday*, 3 N. J. Law, 982; *Manning v. Lyon*, 70 Hun, 345. *Contra*, *Kiddell v. Ford*, 3 Brev. 178.

² *French v. Bank of Columbia*, 4 Cranch, 141.

The fact that the maker was insolvent at the date of the indorsement is no excuse for a failure to demand payment of the note.³ The courts seem to have considered that a man can pass from insolvency to solvency with facile celerity. Even if the fact of insolvency were known to the indorser and he indorsed the paper when overdue, he has yet been considered entitled to a demand,⁴ but this proposition is denied.⁵ If the indorser was merely an accommodation indorser for the benefit of the maker, the latter's insolvency was no excuse for a want of a demand.⁶ If the indorser of the insolvent's paper is a guarantor he is not entitled to notice,⁷ but he would not be even though the maker were not insolvent, by the better rule. The insolvency of the acceptor does not excuse presentment for payment under this rule,⁸ nor does the insolvency of the drawee,⁹ even though the drawer had reason to think the drawee was insolvent.¹⁰ As to a check, the insolvency of the bank ought to seem sufficient reason to any court for not making a demand,¹¹ either as to the drawer or the indorser. The assignment of the drawer of a check must excuse demand upon the bank,¹² or if the drawer tells the payee that he has withdrawn his funds from the bank.¹³ There is no difference between the two cases.

§ 264. Failure to provide funds.—A man who draws a bill of exchange upon another without any authority to do

³ Phipps v. Harding, 70 Fed. R. 468; Hightower v. Ivy, 2 Port. 308; Farnum v. Fowle, 12 Mass. 89; Barton v. Baker, 1 S. & R. 334; Wilson v. Senier, 14 Wis. 380; Groton v. Dallheim, 6 Me. 476. *Contra*, Riddle v. Mott, 2 Cranch, C. C. 73.

⁴ Adams v. Torbert, 6 Ala. 865; Greeley v. Hunt, 21 Me. 455; Colt v. Bernard, 18 Pick. 260. *Contra*, Morris v. Gardner, 1 Cranch, C. C. 213; Stothart v. Parker, 1 Overt. 260.

⁵ See last note.

⁶ Holland v. Turner, 10 Conn. 308; Reynolds v. Douglas, 12 Pet. 498.

⁷ Lewis v. Brewster, 2 McLean, 21; *contra*, Rhett v. Poe, 2 How. 457, *semble*; or an assignor, Hawkins v. Olsen, 48 Ill. 277, under a statute.

⁸ Hunt v. Wadleigh, 26 Me. 271.

⁹ Hawley v. Jett, 10 Oreg. 31.

¹⁰ Cedar Falls Co. v. Wallace, 83 N. C. 225.

¹¹ See § 166, *ante*.

¹² Syracuse Co. v. Collins, 57 N. Y. 641. The assignee becomes owner of the deposit.

¹³ Sutcliffe v. McDowell, 2 Nott & McC. 251.

so, without any reasonable expectation that his draft will be honored, certainly cannot have the hardihood to pretend that his draft should be presented to the drawee, either for acceptance or for payment, unless he provides funds before maturity.¹ But the indorser of the draft may stand in a different position. If he does not know the fact and is not otherwise precluded from claiming a demand, he is still entitled to a demand upon the drawee as a condition precedent to his liability.² But if he knew the fact, some authority holds that he cannot pretend to any such right,³ but the great weight of authority, as we have seen, seems to be otherwise. The indorser of a note is not in an analogous position. Where the note is made payable at a bank or other particular place, he can require a formal demand or the depositing of the note or inquiry on the day at the bank, though no funds have been provided for the payment of the note at the place.⁴ But if the drawer had a reasonable expectation that his draft would be paid,⁵ or if the drawee was indebted to him upon an account payable in money,⁶ but not upon an account payable in something else than money,⁷ he is entitled to claim a demand of the drawee on the part of the holder. This rule has not been carried so far as to hold that where the drawer has promised his accommodation acceptor to furnish funds to pay the bill and does not do so, he is yet entitled to have

¹ *Dickens v. Beal*, 10 Pet. 572; *Rhett v. Poe*, 2 How. 457; *Kinsley v. Robinson*, 21 Pick. 327, and many other cases.

² *Ramdulollday v. Darieux*, 4 Wash. C. C. 61; *Slack v. Longshaw*, 8 Ky. Law R. 166; *Mohawk Bank v. Broderick*, 10 Wend. 304; *Denny v. Palmer*, 27 N. C. 610.

³ *Farmers' Bank v. Van Meter*, 4 Rand. 553. Compare *Ramdulollday v. Darieux*, 4 Wash. C. C. 61.

⁴ *Allen v. Smith*, 4 Har. 234; *Nichols v. Goldsmith*, 7 Wend. 160; *Hufaker v. National Bank of Monticello*, 13 Bush, 644; *Maurin v. Perot*,

16 La. 276; *Gillett v. Averill*, 5 Denio, 85. See *Sherer v. Easton Bank*, 33 Pa. 134. It is enough if an inquiry be made there and the fact of the non-presence of funds ascertained. *Bank v. Lea*, 7 Rob. (La.) 75. Nor can he require a demand if he is the party benefited. *Reed v. Morrison*, 2 Watts & S. 401.

⁵ *Dickens v. Beal*, 10 Pet. 572. The rule was applied in favor of an accommodation drawer of a check. *Mackall v. Gozler*, 2 Cranch, C. C. 240.

⁶ *Walker v. Rogers*, 40 Ill. 278.

⁷ *Kimball v. Bryan*, 56 Iowa, 632.

the demand made upon the acceptor.⁸ And this must be the law, for he is not authorized to anticipate that he will be successful in a dishonest attempt to appropriate the acceptor's property. Nor can the drawer require an absolute demand where the drawee upon presentation of the bill credits upon it the whole balance of the drawer's account at the date the bill or order was drawn.⁹ Or where there was an account between the drawer and drawee and the account had been settled in the drawee's favor without making any allowance for the draft, the drawer is not entitled to claim a demand.¹⁰ The reason for the rule is that the drawer could have no reasonable expectation that his draft would be paid. This reasonable expectation depends upon circumstances, such as a drawing against a consignment, even though a bill of lading failed through inadvertence to be sent or the goods were subsequently lost, or where there was a state of fluctuating accounts between drawer and drawee, or any other reasonable expectation founded on a previous honoring of drafts.¹¹ This rule has not been applied by the courts to checks as well as bills drawn against a balance to the drawer's credit, so as to hold that if the drawer had funds when he drew the check any subsequent shifting of the balance will dispense with the necessity of a demand as to him and notice of non-payment.¹² The true rule is as to checks that there is no particular time required for a demand upon a check, and the drawer is prejudiced, if the bank fails, only if he then had funds to his credit sufficient to pay the check.¹³

⁸ *Harrison v. Trader*, 29 Ark. 85.

⁹ *Blankenship v. Rogers*, 10 Ind. 333.

¹⁰ *Stewart v. Millard*, 7 Lans. 373.

¹¹ *Dickens v. Beal*, 10 Pet. 572.

¹² *Richie v. McCoy*, 13 Smedes & M. 541, as to a bill. For the contrary rule as to checks, see *Fletcher v. Pierson*, 69 Ind. 281; *Culver v. Marks*, 122 Ind. 554; *Armstrong v. Brolaski*, 46 Fed. R. 903; *Case v. Morris*, 31 Pa. 100. If he had no

funds at the date of the check, the evidence that the bank would have paid is inadmissible (*Culver v. Marks, supra*); but if an overdraft had been arranged for under such circumstances that the bank was compelled to pay the check, he is entitled. See § 160, *ante*. The indorser, however, should be notified of the dishonor.

¹³ See § 237, *ante*, and next note.

And if he has no credit when the drawer made up his mind to present, he is not entitled to any demand, for he has drawn out all the funds.¹⁴ The correct rule as to bills of exchange is that the drawer of a bill, who has himself taken his funds out of the drawee's hands prior to the date of proper presentment, cannot claim that a demand should have been made;¹⁵ but an exception is hinted at to the effect that if the accounts were so fluctuating that it might reasonably have been presumed that the draft would have been paid, then a demand should have been made. But no demand is necessary as to the drawer if he has assigned the funds¹⁶ or has told the holder that he has withdrawn his funds from the drawee.¹⁷ But if the drawer, although having no funds in the hands of the drawee when he draws, provides funds to meet the draft before the date when it should have been accepted, or, if accepted, provides them before the date of maturity of the draft, or, if the draft be not required to be accepted and not in fact accepted, provides funds prior to maturity, he is entitled to have demand of payment made;¹⁸ he is not, however, so entitled if he fails to provide funds up to the maturity of the bill.¹⁹ If the maker and indorser upon a note enjoin the collection of it before maturity, it is needless to say that no demand is necessary in order to charge the indorser.²⁰ But unless the indorser upon a bill or check is in some way a party to the failure to provide funds, or is

¹⁴ See § 237, *ante*. But as to the indorser the strict rule as to demand is eminently proper, for he indorses on the present status of the drawer's account.

¹⁵ See note 12, *supra*, and the cases cited in the next two notes, and *Dallfus v. Frosch*, 1 Denio, 367; *Hopkirk v. Page*, Fed. Cas. 6697 (notification that drafts would not be accepted); countermanding order, see *Child v. Moore*, 6 N. H. 33; stopping check, *Jacks v. Darrin*, 3 E. D. Smith, 557; *Purchase v. Mattison*, 6 Duer, 587; counter-

manding draft, *Neederer v. Barber*, Fed. Cas. 10,079; *Manning v. Maroney*, 87 Ala. 563.

¹⁶ *Syracuse Co. v. Collins*, 57 N. Y. 641. Notice should, however, be given to the indorser.

¹⁷ *Sutcliffe v. McDowell*, 2 Nott & McC. 251. Notice should be given to the indorser.

¹⁸ This is admitted to be the rule by all the authorities. See cases cited in this section *passim*.

¹⁹ *Kinsley v. Robinson*, 21 Pick. 327; *Foard v. Womack*, 2 Ala. 368.

²⁰ *Williams v. Bartlett*, 4 Lea, 620.

the real party benefited by the bill or check, he is entitled to claim a demand.

§ 265. **Change of residence.**—If the maker of a note or the drawee or acceptor of a bill changes his residence after the note is made or the bill is drawn or accepted, what must be done by the holder depends upon the place to which he has removed. If the removal is to a place within the same state, we have already considered the question of what is due diligence in the holder by way of inquiry for the new residence and a demand there,¹ as to paper not made payable at a particular place; upon paper so payable, the change of residence, whether in the state or out of it, is perfectly immaterial. The demand is still to be made at the place designated in accordance with the rules heretofore given.² If that particular place of business has been removed, no demand is necessary,³ or at any rate is necessary only under peculiar circumstances.⁴ But as to a note not made so payable, a removal out of the state by the maker dispenses with the necessity of a demand upon the maker.⁵ The holder is not compelled to follow the maker out of the state; but if the absence is temporary, service of demand is necessary at his residence or place of business, or due diligence should be shown in an attempt to find the residence⁶ or place of business. The same will be the rule as to one of the joint makers of a note.⁷ But the maker may have left an agent

¹ See § 259, *ante*.

² *Shaw v. Reed*, 12 Pick. 132; *Farwell v. St. Paul Trust Co.*, 45 Minn. 495.

³ *Smith v. Poillon*, 87 N. Y. 590; and see § 258, *ante*.

⁴ See § 258, *ante*.

⁵ See § 259, *ante*, note 21.

⁶ *Taylor v. Snyder*, 3 Denio, 145; *McClelland v. Bishop*, 42 Ohio St. 113. If a sailor is on the sea demand upon him is excused. *Moore v. Coffield*, 12 N. C. 247. See also *McKee v. Boswell*, 33 Mo. 567.

⁷ *McClelland v. Bishop*, 42 Ohio St. 113. See *Smith v. Little*, 10 N. H. 526, a case of non-residence at the time of making of the note and not of removal from state. The decision is wrong, for the rule differs where, at the time the note was made, the maker lived out of the state. In the latter case demand upon him is necessary. *Spies v. Gilmore*, 1 N. Y. 321; *Bradley v. Patton*, 51 Ala. 108. *Contra*, *Ricketts v. Pendleton*, 14 Md. 320; and see note 9, *infra*.

in the state, and inquiry should be made for one at least at the place of former residence.⁸ But if the maker was a non-resident at the time the note was made, the fact that it is dated in the state does not excuse a demand upon the maker.⁹ The maker, upon his removal, may leave a deposit in the state to pay the note, but he should so inform the holder; for if the holder has no knowledge of the fact, a demand will not be necessary,¹⁰ presupposing, however, due inquiry for an agent on the part of the holder. If the acceptor of a bill changes his residence, the same rule ought to govern a demand upon him as upon the maker of a promissory note.¹¹ And as to the drawee of a bill, it is conceived that the same rules ought to be applied to his change of residence.¹²

§ 266. Absconding of maker or drawee.—Where the maker of the note absconds before the maturity of the note,¹ or where the drawee of a bill absconds,² or where the acceptor absconds,³ no demand is necessary upon him unless the paper is payable at a particular place. The word “absconding” means that the person so conceals his whereabouts that he cannot be found.⁴ If he has actually absconded, inquiry for him would seem to be supererogatory; yet one case wrongly holds that inquiry should be made even though the indorser knew the fact⁵ that he had absconded.

⁸ *Williams v. Bank of United States*, 2 Pet. 96, as to service of notice.

⁹ *Taylor v. Snyder*, 3 Denio, 145; *Spies v. Gilmore*, 1 N. Y. 321; *Bradley v. Patton*, 51 Ala. 108. *Contra*, *Ricketts v. Pendleton*, 14 Md. 320.

¹⁰ *Walton v. Henderson, Smith*, 168.

¹¹ See the preceding notes to this section.

¹² See the preceding notes to this section.

¹ *Taylor v. Snyder*, 3 Denio, 145; *Duncan v. McCullough*, 4 S. & R. 480; *Gillespie v. Hannehan*, 4 Mc-

Cord, 503; *Ratcliff v. Planters' Bank*, 2 Sneed, 425; *McClelland v. Bishop*, 42 Ohio St. 113.

² *Madderson v. Heath Mfg. Co.*, 35 Ill. App. 588.

³ The same rule as to the maker of a note.

⁴ See the cases in note 1. This rule as to absconding has no application to paper payable at a particular place. *Shaw v. Reed*, 12 Pick. 132; *Farwell v. St. Paul Trust Co.*, 45 Minn. 495.

⁵ *Pierce v. Cate*, 12 Cush. 190. *Contra*, *Lehman v. Jones*, 1 Watts & S. 126.

§ 267. **Pestilence and disease.**—The prevalence of a malignant disease or of a pestilence that suspends the functions of commerce ought to be an excuse for a failure to make a demand upon the person to be charged, if the pestilence prevails either at the place where the person resides or at the place where the holder resides. A decent regard for the public health would preclude the holder either going himself or sending an agent from the infected locality into a place where the pestilence did not prevail, even if public precaution should permit it; perhaps the person to be charged would refuse all personal communication with him; and if the pestilence prevailed in the place where the person to be charged lived, it is asking too much of any one to make a demand at the peril of his life, even if he could expect to find the person there. If the parties live in the same place where the disease is prevalent, all business will be suspended by people of even rudimentary intelligence.¹ But the demand will be excused no longer than the pestilence prevails, which is a limitation that is reasonable, because demand should not be excused altogether.² It is reasonable to suppose that the person who ought to pay would do so as soon as business was resumed.

§ 268. **War and interdiction of intercourse.**—The existence of a state of war between the country of the maker of a note or the drawee of a bill and that of the holder, or the interdiction of commercial intercourse between the places where the holder and where the person upon whom demand is to be made resides, excuses a delay in the demand, but not a total failure to make a demand.¹ The demand must be made as soon as it is reasonably and conveniently possible after the commercial relations have been resumed.²

¹ See *Tunno v. Lague*, 2 Johns. Union Bank v. Robertson, 19 La. Cas. 1; *Hanauer v. Anderson*, 16 Ann. 72; *Norris v. Despard*, 38 Md. Lea, 340; *Roosevelt v. Woodhull*, 487; *Dunbar v. Tyler*, 44 Miss. 1; *Anth. N. P.* 50. *Hardin v. Boyce*, 59 Barb. 425. See

² See note 7 to the next section Ford v. McClung, 5 W. Va. 156.
for the rule as to a state of war.

¹ *Jex v. Tureaud*, 19 La. Ann. 64; ² *Lane v. Bank of West Tennessee*, 9 Heisk. 419, and cases in last note

The extent of the interruption to excuse delay in a demand is either a matter of proof or a fact of which the court takes judicial knowledge.³ The cases are not clear upon this point, but, on principle, the question ought to be one solely for the court.⁴ But the existence of a state of war will not excuse a demand, if a demand would have been legal and could have been made by the use of reasonable diligence.⁵ One case went so far as to hold that the interruption of the mail was not sufficient to excuse a transmission of notice where other means that were practicable were not used,⁶ and a number of other cases as to transmission of notice in time of war will be found under the head of notice to a drawer or indorser.⁷ But the reason of those cases cannot apply to a demand where the demand must be made within hostile lines. It would be illegal for the holder to venture into the hostile country, and it would be equally illegal to require him for the purposes of demand to send his property into a belligerent's territory to some agent therein, or by some agent who penetrates into the hostile territory. The making of any contract between alien enemies is inhibited by the accepted rules of law. Therefore a demand must, in such cases, be excused until the obstacles to making a demand have ceased to exist.⁸ But if the parties live in the same section and there be no hostile occupation therein, the delay in demand is not excusable,⁹ unless the war has demoralized and obstructed the ordinary regulations of trade.¹⁰

ARTICLE IV.—NOTICE OF NON-PAYMENT.

§ 269. Notice of dishonor in general.—Where a demand has been made upon a promissory note or due diligence has

³ Proof may be offered, but it should be for the court.

⁴ The existence of a state of war is necessarily a question of law.

⁵ See the cases in note 1, and the first case cited in the next note.

⁶ *United States v. Barker*, Fed. Cas. No. 14,519. See *Citizens' Bank v. Pugh*, 19 La. Ann. 43.

⁷ See § 291, *post*.

⁸ *Berry v. Southern Bank*, 2 Duv. 379; *Gayarre v. Sabatier*, 24 La. Ann. 358.

⁹ *Lane v. Bank of West Tennessee*, 9 Heisk. 419. But compare *Peters v. Hobbs*, 25 Ark. 67.

¹⁰ See last case in last note.

been used in trying to make a demand, and the note has not been paid, or where a bill of exchange or a check has been presented for acceptance and an acceptance has been refused, or where a bill has been presented for payment or due diligence shown in the attempt to present, and the bill has not been paid, the indorser of the note and the drawer and indorser of the bill or the indorser of a check are entitled to notice of the dishonor, and a failure to use due diligence in order to give such notice discharges the drawer and indorser of a bill or the indorser of a check or note except in those cases which will be hereinafter noticed. The anomalous case of an indorser of a certificate of deposit has been already noticed.¹ This discharge that results from a failure in due diligence in giving notice of dishonor is as absolute as the discharge that results from a failure in due diligence in making a demand. As it has been pointed out, certain bills of exchange require no demand of payment as against the drawer, because they are the drawer's promissory notes.² But the indorser upon such bills is in the attitude of an indorser upon a promissory note as to notice.³ Again, certain kinds of indorsers stand in the position either of drawers of bills or makers of notes.⁴ Their right to notice of dishonor is to be determined as to bills by the fact as to whether they have the right to claim a demand.⁵ As to such indorsers of notes they are as makers not entitled to notice of dishonor.⁶ Certain other indorsers are treated as guarantors.⁷ Not being entitled to claim a demand, such indorsers are not entitled to notice of dishonor.⁸ Therefore the rule may be said to be that whoever is entitled to claim that a demand of payment should be made or due diligence shown therefor, on penalty of his discharge, is entitled to claim that notice of dishonor should be given to him or due diligence shown therefor, on penalty also of his discharge;⁹ and the converse

¹ See § 243, *ante*.

² See § 208, *ante*.

³ He is the indorser of an accepted bill or a promissory note.

⁴ See §§ 236, 240, *ante*.

⁵ See §§ 236, 240, *ante*.

⁶ See § 240, *ante*.

⁷ See § 241, *ante*.

⁸ See § 241, *ante*.

⁹ Thus if the maker has ab-

of the rule is also true, except that if a demand is actually made and payment refused notice must be given. The drawer of a check can only object for want of notice where the failure to notify him of the dishonor causes him actual injury, and then to the extent of his injury. Subject to the foregoing qualifications, we proceed to discuss the rules of law as to notice of dishonor.

§ 270. Form and recitals of the notice.—The notice may be either oral or written.¹ This is true even as to the notice of dishonor upon a foreign bill;² and a copy of the certificate of protest, either upon non-acceptance or non-payment, need not accompany the oral or written notice of such dishonor.³ The notice is sufficient if it informs the party, either expressly or impliedly, that the paper has been dishonored and that he will be looked to for payment.⁴ Thus a verbal notice is good, though the note or bill is not described or produced, if the indorser knows what paper was meant.⁵ And so of written notices; any notice is sufficient if it informs the party, either expressly or impliedly, that the paper has been presented for payment and payment refused.⁶ The conclusion

scended, notice should be given (Hilborn v. Artus, 4 Ill. 344, under a statute). Michaud v. Legarde, 4 Minn. 43; Williams v. Matthews, 3 Cow. 252. If he has changed his residence out of the state or so that he cannot be found, notice should be given. Wolfe v. Jewett, 10 La. 384. Or if he be insolvent or had no funds notice should be given. French v. Bank of Columbia, 4 Cranch, 141; Rhett v. Poe, 2 How. 457; Mohawk Bank v. Broderick, 10 Wend. 304.

¹ Cuyler v. Stevens, 4 Wend. 566; First Nat. Bank v. Hatch, 78 Mo. 13; Teconic Bank v. Stackpole, 41 Me. 321; Pierce v. Schaden, 55 Cal. 406; Martin v. Brown, 75 Ala. 442; Higgins v. Morrison, 4 Dana, 100. But

oral notice ought to be personal notice.

² Linville v. Welch, 29 Mo. 203.

³ Wallace v. Agry, 4 Mason, 336; Cowperthwaite v. Sheffield, 1 Sandf. 146; Atwater v. Streets, 1 Doug. 455; Linville v. Welch, 29 Mo. 203.

⁴ Bank v. Norwood, 1 Har. & J. 423; Snow v. Perkins, 2 Mich. 238; Burkham v. Trowbridge, 9 Mich. 209; Stoughton v. Swan, 4 Cal. 213; Legg v. Vinal, 165 Mass. 555; Solomon v. Pfeister Leather Co. (N. J.), 31 Atl. R. 602. But a statement that the paper is unpaid does not show a demand. Townsend v. Lorain Bank, 2 Ohio St. 345.

⁵ Thompson v. Williams, 14 Cal. 160.

⁶ Platt v. Drake, 1 Doug. 296;

need not be added that the holder looks to him for payment, for that is the irresistible and necessary conclusion from the act of giving notice.⁷ Thus notice to the indorser of the commencement of an action upon an overdue note is notice of non-payment,⁸ or service of process on the maker notified to the indorser is sufficient in form,⁹ or the presentation of the dishonored draft for payment,¹⁰ or the presenting of an account charging the person to whom notice is to be given, with the amount of the paper, protest fees and interest.¹¹ The notice may be printed or written;¹² the signature of the notary may be written or printed.¹³ The notice itself need not be addressed if the envelope in which it is contained is addressed.¹⁴

The person to whom notice is being given should be addressed by his true name; but mere inaccuracies in the name do not vitiate the notice, where the person to whom the notice is sent is not thereby misled.¹⁵ A mistake in the name which is caused by the illegibility of the person's signature on the dishonored paper will not affect the notice.¹⁶

Newberry v. Trowbridge, 4 Mich. 391; Fisk v. Morse, 16 N. H. 271; Armstrong v. Thruston, 11 Md. 148; Littlehale v. Mayberry, 43 Me. 264. A statement that the note is due and unpaid is not sufficient. Pinkham v. Macy, 9 Met. 174; Arnold v. Kinloch, 50 Barb. 44. *Contra*, Wolf v. Lauman, 34 Mo. 575. See as to paper payable at a particular place, the opposite rule, Clark v. Eldridge, 13 Met. 96; Hunter v. Van Bomhorst, 1 Md. 504.

⁷ Graham v. Sangston, 1 Md. 59; Shrieve v. Duckham, 1 Litt. 194; Townsend v. Lorain Bank, 2 Ohio St. 345; Warren v. Gilman, 17 Me. 360; Cowles v. Harts, 3 Conn. 517.

⁸ Chadwick v. Jeffers, 1 Rich. Law, 397. ⁹ Bull v. Hoge, 2 Hilt. 81. See Hirschfelder v. Manufacturing Co., 17 N. Y. Supp. 726.

¹⁰ De Wolf v. Murray, 2 Sandf. 166.

¹¹ Bank v. Woods, 28 N. Y. 561.

¹² Fulton v. McCracken, 18 Md. 528, signature put on by his clerk; Sussex Bank v. Baldwin, 17 N. J. Law, 487; Bank v. Woods, 28 N. Y. 561; Spalding v. Krutz, 1 Dill. 414.

¹³ Denegre v. Hiriart, 6 La. Ann. 100; Glicksman v. Earley, 78 Wis. 223.

¹⁴ Carter v. Bradley, 19 Me. 62.

¹⁵ Manufacturers' Bank v. Hazard, 30 N. Y. 226.

¹⁶ But notice of the suit

The notice should be signed, a mere unsigned notice being worthless;¹⁷ but the notary's signature to a notice which is unsealed is good.¹⁸ The notice need not be dated,¹⁹ or the date may be indicated by any of the usual abbreviations.²⁰ The notice, however, will not be destroyed as a notice, even if it be post-dated or ante-dated.²¹

In regard to its contents and recitals, it need not state who is the owner and holder of the note, nor upon whose behalf the notice is given,²² and need not state where the paper may be found.²³ The particular paper should be described in such a way as to indicate what paper it refers to, but a mistake as to the date does not invalidate the notice,²⁴ except where the error would mislead by showing protest before maturity.²⁵ Mistakes in the description of the note, such as an error as to the name of a subsequent indorser to the one to whom notice is being given,²⁶ a mistake as to the name of the drawer or day of maturity,²⁷ a mistake as to the amount of the note²⁸ or its date,²⁹ or a mistake as to an indorser's name,³⁰ do not destroy the efficacy of the notice. Omissions of date of the note,³¹ or name of the maker,³² or

¹⁷ People's Nat. Bank v. Dibrell, 91 Tenn. 301; Walmsley v. Acton, 44 Barb. 312; Walker v. State Bank, 8 Mo. 704.

¹⁸ Crawford v. Branch Bank, 7 Ala. 205; Huffaker v. National Bank, 12 Bush, 287.

¹⁹ Artisans' Bank v. Backus, 36 N. Y. 100.

²⁰ Brown v. Jones, 125 Ind. 375 (indicating month by number).

²¹ Lennig v. Tobley, 4 Clark, 275; s. c., 14 Pa. 483; Journey v. Price, 2 Houst. 176.

²² Coffman v. Bank of Ky., 41 Miss. 212; Mills v. United States Bank, 11 Wheat. 431; Brown v. Jones, 125 Ind. 375; Shedd v. Brett, 1 Pick. 401.

²³ Howe v. Bradley, 19 Me. 31.

²⁴ Tobey v. Lennig, 14 Pa. 483 (the

date of maturity was given); and see next two cases cited.

²⁵ Mills v. Bank of U. S., 11 Wheat. 431; Bank of U. S. v. Watterson, 4 Cranch, C. C. 445; De La Hunt v. Higgins, 9 Abb. Pr. 422; Ross v. Planters' Bank, 5 Humph. 335.

²⁶ Meyers v. Bank of Tenn., 3 Head, 330.

²⁷ Smith v. Whiting, 12 Mass. 6.

²⁸ Snow v. Perkins, 2 Mich. 238; Rowan v. Odenheimer, 5 Smedes & M. 44.

²⁹ See note 24.

³⁰ Moorman v. Bank of Alabama, 3 Port. 353 (it was a subsequent indorser); Gill v. Palmer, 29 Conn. 54 (indorser described as drawer).

³¹ Cayuga Co. Bank v. Warden, 1 Comst. 413.

³² Howland v. Adrian, 30 N. J. Law,

date of maturity,³³ or of the name of an indorser,³⁴ or of the number of the note,³⁵ or an omission or mistake in any other particular, does not vitiate the notice, unless by reason of the fact that there were more than one note to answer the description,³⁶ or by reason of the fact that the person receiving the notice has been misled to his injury.³⁷

The notice should contain some statement either directly made or inferable by necessary result that the paper has been presented for payment and payment has been refused.³⁸ But equivocal statements,³⁹ or a statement to the indorser that the note is due and unpaid,⁴⁰ if not payable at a particular place, or a verbal notice given the next day after maturity stating that payment had been demanded on the last day of grace and if note was not paid on the day of the verbal statement notice would be given,⁴¹ cannot be considered as statements of a demand and non-payment. But a statement that the paper was "duly protested" or "protested" for non-payment is a complete recital of presentment for payment, refusal of payment, and notice of dishonor to the indorser, for the meaning of the word "protested" includes both the formal act of the notary and the informal act of a third party.⁴² There were once decisions of author-

41. But see *Home Ins. Co. v. Green*, 19 N. Y. 518.

³³ *Gates v. Beecher*, 60 N. Y. 518; *Saltmarsh v. Tuthill*, 13 Ala. 390.

³⁴ *Moorman v. Bank of Alabama*, 3 Port. 353; *King v. Hurley*, 85 Me. 525.

³⁵ *Hodges v. Shuler*, 22 N. Y. 114.

³⁶ *Cook v. Litchfield*, 9 N. Y. 279. See *Bank of Cooperstown v. Woods*, 28 N. Y. 561, and *Davenport v. Gilbert*, 4 Bosw. 532.

³⁷ *Manchester Bank v. White*, 30 N. H. 456. Any notice is sufficient if the instrument dishonored was intended to be described and such details are given as will put upon inquiry, and the person to be noti-

fied was not misled. *Bank of Alexandria v. Swann*, 9 Pet. 33; *Cooper v. Gibbs*, 4 McLean, 396; *Reedy v. Seixas*, 2 Johns. Cas. 337; *Beals v. Peck*, 12 Barb. 245.

³⁸ See note 6, *supra*.

³⁹ *Klockenbaum v. Pearson*, 16 Cal. 375; *Townsend v. Lorain Bank*, 2 Ohio St. 345.

⁴⁰ *Pinkham v. Macy*, 9 Met. 174. But see *Clark v. Eldridge*, 13 Met. 96.

⁴¹ *Bank of U. S. v. Barry*, 2 Cranch, C. C. 307; *Union Bank v. Fonteneaux*, 12 Rob. (La.) 120.

⁴² *Wheaton v. Wilmarth*, 13 Met. 422; *Cook v. Litchfield*, 5 Sand. 330, 9 N. Y. 279; *Burgess v. Vreeland*, 24

ity *contra*, but they are overruled.⁴³ The mode of demand⁴⁴ or the time of demand need not be stated,⁴⁵ but if the time is stated it must be correctly stated, for notice of the naked fact of non-payment, if accompanied by a demand on the indorser, is sufficient.⁴⁶ If the paper is payable at a particular place, notice that it is due and unpaid is sufficient.⁴⁷ But notice of demand and non-payment is something that can be given so easily in proper form, or, if not given, the excuse can be given in so few words, that no one ought to have difficulty in following a form; approved ones may be found in the note.⁴⁸ The difficulty is that a holder never thinks of consulting a lawyer until, by his ignorance, he has plunged himself into a difficult position.

Notice should be given upon the first dishonor.⁴⁹ A holder cannot redeem himself for his failure by making a second demand and giving notice of that,⁵⁰ although if what took place was not in legal contemplation a demand, he may make a good demand. If acceptance is refused, notice of

N. J. Law, 71; *Glicksman v. Earley*, 78 Wis. 223; *Selden v. Washington*, 17 Md. 379.

⁴³ See *Burkham v. Trowbridge*, 9 Mich. 209; *Cromer v. Platt*, 37 Mich. 132.

⁴⁴ *Sanger v. Stimpson*, 8 Mass. 260.

⁴⁵ See *Tavis v. Wood*, 5 Cal. 393; *Reynolds v. Appleman*, 41 Md. 615. But see *Stephenson v. Dickson*, 24 Pa. 148.

⁴⁶ *Mills v. United States Bank*, 11 Wheat. 431.

⁴⁷ See note 40 and note 6, *supra*, and *Sasscer v. Farmers' Bank*, 4 Md. 409. But where a clearing-house is in operation, the exchange of checks at the clearing-house is not a demand; and if the bank presenting the check receives the clearing-house paper upon the drawee bank for the check, which

paper is dishonored by the refusal of payment, the clearing-house paper is not to be protested, but the original check should be obtained from the bank refusing the clearing-house paper, and demand should be made on that original paper, and the check protested for non-payment. Notice is to be given upon this demand, not upon any provisional presentation through the clearing-house. *Merchants' Nat. Bank v. Procter*, 1 Cin. R. 1.

⁴⁸ *Reynolds v. Appleman*, 41 Md. 615; *Stephenson v. Dickson*, 24 Pa. 148.

⁴⁹ See cases in the following notes.

⁵⁰ *Rice v. Wesson*, 11 Met. 400; *Stanley v. Farmers' Bank*, 17 Kan. 592. But this rule ought not to preclude a good demand on the same day.

dishonor must be given,⁵¹ whether presentation for acceptance was needed or not; if demand is made upon demand paper before there is any necessity for it, and payment refused, notice should be given.⁵² If the paper does not require any demand whatever, but a demand is made, notice need not be given;⁵³ but the party to be charged by notice cannot object that a demand upon such paper was made.⁵⁴

§ 271. Mode of serving notice.—The methods of giving notice are by personal service, either actual or constructive, corresponding to an actual or constructive personal demand, by service at a place designated as the place of serving notices, or by mail, which is another kind of constructive personal service. Oral notices of dishonor can only be served, of course, in the first two methods. The cases in which notices can be served by mail are dependent upon the residences of the parties, unless the rule has been changed by statute. The natural order to consider the question is to first determine when notices can be served by mail, then the sufficiency of the service by mail, and then the cases of personal service.

§ 272. When service by mail permitted.—The propriety of a service by mail is dependent upon the residence of the parties. It is allowable in all cases, except when the party giving the notice and the one receiving the notice reside in the same place. It will be advantageous to consider the various situations that may arise. The holder may serve the notices himself or he may serve them through an agent. The agent may reside in the same place as the holder, or in the

⁵¹ *United States v. Barker*, 4 Wash. C. C. 464, 12 Wheat. 559; *Adams*, 48 Pa. 261. See *Austin v. Rodman*, 8 N. C. 194.

Smith v. Roach, 7 B. Mon. 17; *Pendleton v. Knickerbocker Life Ins. Co.*, 5 Fed. R. 238; *Landrun v. Trowbridge*, 2 Met. (Ky.) 281; *Carmichael v. Pennsylvania Bank*, 4 How. (Miss.) 567. *Contra*, *House v.*

Rice v. Wesson, 11 Met. 400.

⁵² This is non-negotiable paper. Some courts, as we have seen, allow the drawer or indorser to claim demand.

⁵³ *Central Bank v. St. John*, 17 Wis. 157.

same place as the party to be charged by notice, or he may reside in a different place from either. The holder serving may receive the notices from his agent in another place, or he may make them out himself. All the parties — holder, agent and party to be charged — may reside in the same place. Confining ourselves first to a case where an agent does not supervene, if the holder giving notice and the party receiving notice reside in the same city or town, service by mail is not permissible; the service must be personal,¹ except where there is a free delivery system covering the indorser's residence, and the notice is mailed so that it will be delivered on the same day that it is mailed.² In other cases the service must be personal, if the parties reside in the same town.³ But nevertheless if the mail is used, and the person to be charged is shown to have received the notice on the same day that he would have been entitled to receive it by personal service,⁴ but not later,⁵ the service is good; and a person may have a place of business in the city where service is being made and reside outside of the city. In such a contingency the service must be personal upon him, either actually or constructively so,⁶ and some authority holds that the service must be personal even though he have no place of business in the city.⁷ But if he have no place of business

¹ *Williams v. Bank of U. S.*, 2 Pet. 96; *Bowling v. Harrison*, 6 How. 248; *Spalding v. Krutz*, 1 Dill. 414; *Curtis v. State Bank*, 6 Blackf. 312, and many other cases. The case of *Farmers' Bank v. Battle*, 4 Humph. 85, extends the rule as to the same place to a neighborhood using the same postoffice.

² *Morton v. Cammack*, 4 McA. 22; *Bell v. Hagerstown Bank*, 7 Gill, 216; *Walters v. Brown*, 15 Md. 285; *Shoemaker v. Mechanics' Bank*, 59 Pa. 79.

³ See cases in note 1, *supra*.

⁴ *Hyslop v. Jones*, 3 McLean, 96; *Spalding v. Krutz*, 1 Dill. 414; *Cabot*

Bank v. Warner, 92 Mass. 522; *Hendershot v. Nebraska Nat. Bank*, 25 Neb. 127; *Grinman v. Walker*, 9 Iowa, 426; *Foster v. Sineath*, 2 Rich. Law, 338.

⁵ See cases in last note and *Terbell v. Jones*, 15 Wis. 253; *Nevins v. Bank of Laningsburgh*, 10 Mich. 547; *Gordon v. Pedrick*, 6 Phila. 254.

⁶ *Vowell v. Patton*, 2 Cranch, C. C. 312; *Patrick v. Beasley*, 6 How. (Miss.) 609; *Brown v. Bank of Abingdon*, 85 Va. 95.

⁷ *Louisiana State Bank v. Rowel*, 6 Mart. (N. S.) 506; *Nashville Bank v. Bennett*, 1 Yerg. 166; *Davis v.*

in the city where service is being made and reside outside of the city, having his mail delivered at the city postoffice, the better authority is that he may be served by mail;⁸ but some authority seems to suggest the use of special messenger or a personal delivery in that case.⁹ Therefore a notice mailed to a person in the same place,¹⁰ or by a drop letter,¹¹ is *prima facie* bad without more appearing, unless the rule is changed by statute, as it is in many instances,¹² or unless the rule be changed by a banking custom, as to a bank giving notices upon paper payable at the bank,¹³ but not upon other paper, even though the custom be known to the person to be charged.¹⁴ In case the notices are served by an agent, the residence of the agent may be regarded in order to determine the propriety of the mailing of the notice.¹⁵ But even if the agent sending the notices to the holder lives in

Bank of Tennessee, 4 Sneed, 390. See Ireland v. Kip, 10 Johns. 490, 11 Johns. 231, and compare Ransom v. Mack, 2 Hill, 587; Paton v. Lent, 4 Duer, 231.

⁸ Forbes v. Omaha Nat. Bank, 10 Neb. 338; Carson v. State Bank, 4 Ala. 148; Fisher v. State Bank, 7 Blackf. 610; Barret v. Evans, 28 Mo. 331; Bank of Columbia v. Lawrence, 1 Pet. 578; Walker v. Bank of Augusta, 3 Ga. 486; Bondurant v. Everett, 1 Met. (Ky.) 660; Westfall v. Farwell, 13 Wis. 504; Sander-son v. Reinstadler, 31 Mo. 483; Jones v. Lewis, 8 Watts & S. 14; Foster v. Sineath, 2 Rich. Law, 338; Timms v. Delisle, 5 Blackf. 447; Bell v. State Bank, 7 Blackf. 456. The distances from the city in these cases vary from one and a half miles from the city to nine miles therefrom. Bird v. McCalop, 2 La. Ann. 351. *Contra*, Power v. Mitchell, 7 Wis. 161 (under statute).

⁹ Fish v. Jackman, 19 Me. 467. See cases in note 7 and Van Vech-

ten v. Pruyn, 9 How. Pr. 222, 13 N. Y. 549. Where the indorser resides at the place, it seems that he must be served there personally and cannot be served by mailing to his place of business elsewhere.

¹⁰ Clay v. Oakley, 5 Mart. (N. S.) 137, and cases in note 1.

¹¹ Newberry v. Trowbridge, 4 Mich. 391.

¹² Peet v. Zanders, 6 La. Ann. 364; Jameson v. Pothaus, 26 La. Ann. 63; McNatt v. Jones, 52 Ga. 473; Glicksman v. Earley, 78 Wis. 223; Brennan v. Vogt, 97 Ala. 647; Isbell v. Lewis, 98 Ala. 550; Kern v. Von Phul, 7 Minn. 426, are cases under statutes.

¹³ Gindrat v. Mechanics' Bank, 7 Ala. 324; Chicopee Bank v. Eager, 9 Met. 583; Carolina Nat. Bank v. Wallace, 13 S. C. 347.

¹⁴ Lime Rock Bank v. Hewett, 52 Me. 531.

¹⁵ Greene v. Farley, 20 Ala. 322. *Contra*, Foster v. McDonald, 5 Ala. 376.

the same town with the party to whom notice is being given, the residence of the holder may govern as to mailing;¹⁶ if, however, the notary sends the notices to the town where the person to be charged lives, for the purpose of having the proper address inserted, the notice may be mailed.¹⁷ It may happen that the notary or agent will make demand in the place where the indorser resides, but where the agent does not reside. In such cases the notices may be mailed.¹⁸ But the agent is acting for the holder and he may therefore govern his actions by the residence of the holder; and if the agent living in the same town with the indorser mails the notices to the holder, and if the holder does not reside in the same place with the party to be charged, the notice may be mailed whatever the residence of the notary.¹⁹ But although a service by mail is permitted it is not compulsory, and if a special messenger is used for the purpose of making a personal service, the service is none the less good,²⁰ provided the messenger exercises due diligence.²¹

§ 273. Sufficiency of mailing.—If notice by mail be permissible, a proper notice, mailed at a proper time, and properly stamped and addressed, is a good service of notice, whether the person ever received it or not.¹ But a letter addressed to a place where there is no postoffice is, generally speaking, not good.² If the place, however, has another

¹⁶ *Bibb v. McQueen*, 42 Ala. 408; *Duncan v. Young*, 1 Mart. (O. S.) 32.

¹⁷ *Hartford Bank v. Stedman*, 3 Conn. 489.

¹⁸ The place of residence governs, not the place of presentment. *West River Bank v. Taylor*, 7 Bosw. 466, 34 N. Y. 128. See *Fahnestock v. Smith*, 14 Iowa, 561.

¹⁹ *Foster v. McDonald*, 5 Ala. 376; *Gindrat v. Mechanics' Bank*, 7 Ala. 324. But the agent forwarding ought to be treated as a holder, and if the agent lives in another place, although the holder resides in the same place as the indorser, mail

service ought to be permitted. *Shelburne Falls Bank v. Townsley*, 102 Mass. 177; *Warren v. Gilman*, 17 Me. 360.

²⁰ *Bank of Columbia v. Lawrence*, 1 Pet. 578; *Hazelton Coal Co. v. Ryerson*, 20 N. J. Law, 129.

²¹ *Jarvis v. St. Croix Mfg. Co.*, 23 Me. 287.

¹ *Harris v. Robinson*, 4 How. 336; *Sanderson v. Reinstadler*, 31 Mo. 483; *Smyth v. Hawthorn*, 3 Rawle, 355; *Walworth v. Seaver*, 30 Vt. 728, and many other cases.

² See case cited in note 4.

place for the receipt of mail, where its mail is regularly received, there seems to be no good reason for saying that the letter is not properly mailed.³ But if the postoffice at a place has been discontinued for a considerable period of time, a letter put into the mail addressed to such a postoffice would not constitute a service.⁴ A letter is mailed when it reaches any portion of the postoffice, as a street or building letter-box,⁵ any branch postoffice,⁶ or a room in the postoffice where mail is received by one acting in the postoffice, although it may not be the regular postoffice room, and though it is received by an unsworn assistant.⁷ A letter delivered to a mail carrier on his route is mailed.⁸ A letter properly folded and addressed is no less a letter, because it is not inclosed in an envelope.⁹ It is immaterial whether or not the letter is regularly put into the mail by the postmaster.¹⁰ But a letter put into a private letter-box not under government control is not mailed;¹¹ nor was a letter deposited in the Confederate mail service.¹² The person giving the notice by mail is not responsible for any mis-carriage in the postoffice, and this rule applies where the mailing is done under a banking custom,¹³ or under a free-delivery system,¹⁴ or under a statute, as well as under the law merchant.

§ 274. Personal service of notice.—Personal service is required only in the case mentioned in the preceding sec-

³ *First Nat. Bank v. Owen*, 23 Iowa, 185. The letter would be certain to be received in due course of mail.

⁴ *Davis v. Beckham*, 4 Humph. 53. But see case in note 3.

⁵ *Casco Nat. Bank v. Shaw*, 79 Me. 376; *Johnson v. Brown*, 154 Mass. 105; *Wood v. Callaghan*, 61 Mich. 402. The letter chute of a large building is a part of the letter-box.

⁶ The branch postoffice is a regular postoffice.

⁷ *Mt. Vernon Bank v. Holden*, 2 R. I. 467.

⁸ *Pierce v. Langfit*, 101 Pa. 507; *Wynen v. Schappert*, 6 Daly, 558.

⁹ *Kern v. Von Phul*, 7 Minn. 426.

¹⁰ *Sasscer v. Farmers' Bank*, 4 Md. 409.

¹¹ *Townsend v. Ould*, 31 N. Y. Supp. 29.

¹² *Todd v. Neal*, 49 Ala. 266 (questionable).

¹³ *Lincoln Bank v. Hammatt*, 9 Mass. 159; *Chicopee Bank v. Eager*, 9 Met. 583; *Benedict v. Rose*, 16 S. C. 629.

¹⁴ *Shoemaker v. Mechanics' Bank*, 59 Pa. 79.

tion, to wit, that where the party serving notice and the party to be served reside in the same place. This personal service may be actual or constructive. An actual personal service may be made at any hour or at any place if it be not otherwise too late.¹ The service is equally personal whether served upon the person himself or served by leaving the notice with some one in his place of business, or some proper person at his house.² The preliminary question to be determined is whether the service needs be made at the place of business or the residence. If the place of business is in the same town or city, but the residence is outside of the city, the service must be made at the place of business unless it is personal at the residence and not by mail.³ But where the residence and the place of business are in the same place, and there has been no direction as to service, the notice may be given at either place,⁴ and the person charged by notice has no right to complain that either place has been chosen. If the person to be served is actually found at his residence or place of business the hour of service makes no difference. But where the service is made by a constructively personal service the hour is a matter of importance. If served at the place of business the hour of service must be during business hours.⁵ In order to determine what are the hours of business the rules stated in a preceding section⁶ as to demand should be consulted. If the constructive personal service is had at the residence, the hour is not a matter of much importance⁷ because the occupant of the domicile is expected

¹ At any place. *Hyslop v. Jones*, 3 McLean, 96. At any hour. *Adams v. Wright*, 14 Wis. 408. See *Hallowell v. Curry*, 41 Pa. 322, service at 12 P. M.

² *Isbell v. Lewis*, 98 Ala. 550; *Westfall v. Farwell*, 13 Wis. 504.

³ See cases cited in note 6, § 272, *ante*.

⁴ *Bank of Columbia v. Lawrence*, 1 Pet. 578; *Phillips v. Alderson*, 5 Humph. 403; *Simms v. Lasken*, 19

Wis. 390 (under a statute). This rule applies to a partnership. *Fourth Nat. Bank v. Altheimer*, 91 Mo. 190.

⁵ *John v. City Nat. Bank*, 57 Ala. 96; *Stephenson v. Primrose*, 8 Port. 155. In Alabama an attorney's business hours include the evening. *Stanley v. Bank of Mobile*, 23 Ala. 652.

⁶ See § 250, *ante*.

⁷ See note 1 to this section.

to return there after business hours. A service as late as 12 o'clock at night at the residence has been approved,⁸ as well as a service at an early hour in the morning.⁹ In order to determine whether or not the place is actually the place of business for service, the person serving may rely upon appearances,¹⁰ upon signs and notices,¹¹ or upon what he is told by any one in the place of business.¹² If the place of business is closed, and no one there, the notice may be left under the door.¹³ If it is open, but no one there, the notice may be left on the desk of the person to be charged,¹⁴ or at the person's desk in the office where he was employed,¹⁵ or in the particular room of the party to be served in a building.¹⁶ If there be some one there, such as the wife, the person in charge,¹⁷ a bookkeeper, the private secretary,¹⁸ employee or slave,¹⁹ or one who is not shown to be connected

⁸ *Hallowell v. Curry*, 41 Pa. 322. The rule would be different as to a demand, and properly so. A notice does not require affirmative action upon the spot, but a demand does.

⁹ But see *Dufour v. Morse*, 9 La. 333.

¹⁰ *Lamkin v. Edgerly*, 151 Mass. 348 (a statute); *Libby v. Adams*, 32 Barb. 542. It has been held that the place where the indorser is employed is his place of business. *Bank of West Tenn. v. Davis*, 5 Heisk. 436. But notice to a son-in-law, at the latter's office, for the indorser, is not good; the indorser was away from home, but his family remained. *Bank of New Orleans v. Millaudon*, 25 La. Ann. 280. On postmaster at postoffice. *Cook v. Renick*, 19 Ill. 598.

¹¹ See cases in last note.

¹² *Libby v. Adams*, 32 Barb. 542.

¹³ *Jones v. Mansker*, 15 La. 51. Or not given at all. *Howe v.*

Bradley, 19 Me. 31; *Union Bank v. Fowlkes*, 2 Sneed, 555; *Bowie v. Blacklock*, 2 Cranch, C. C. 265.

¹⁴ *Hobbs v. Straine*, 149 Mass. 212. And see *Commercial Bank v. Gove*, 15 La. 113.

¹⁵ *Bank of Commonwealth v. Mudgett*, 45 Barb. 663.

¹⁶ *Bank of U. S. v. McDonald*, 4 Cranch, C. C. 624.

¹⁷ *Mercantile Bank v. McCarthy*, 7 Mo. App. 318; *Edson v. Jacobs*, 14 La. 494; *Lord v. Appleton*, 15 Me. 270. Left with mate on board ship commanded by indorser. *Austin v. Latham*, 19 La. 88. Left with wife or person in charge of place of business. *Aurianne v. Eschbacker*, 28 La. Ann. 48.

¹⁸ *Jones v. Mansker*, 15 La. 51; *Merz v. Kaiser*, 20 La. Ann. 377. But see *Paine v. Edsell*, 19 Pa. 178. This case also decides that if the direction given to the clerk is not to open the letter the notice is bad.

¹⁹ *Bank of U. S. v. Merle*, 2 Rob.

with the proprietor,²⁰ the notice may be left with him. The temporary absence of the person from his place of business,²¹ even though it be for a period of some length of time,²² does not prevent service there. A bank is properly served at its banking-house,²³ a corporation at its office, even though it had no right to maintain one at the place,²⁴ and a suspended bank or other corporation is properly served where its business is being wound up.²⁵ Partnerships are served by leaving the notice at their places of business²⁶ or at the residence of one of the partners.²⁷ The dissolution of the partnership does not prevent the service of notice upon either of the partners²⁸ or a surviving partner,²⁹ whether the fact be known to the holder or not.³⁰ But if an office is in a building, the service must be made at the particular office, not in the building generally.³¹ The place of business may be a desk in some other person's office,³² or even a place where the person is accustomed to go for the purpose of receiving mail but not attending to business;³³ but a room where the person to be served was accustomed to resort, but not for

(La.) 117. The opinion recognizes that a slave is a human being; its date is 1842. *Bros. Co.*, 94 Tenn. 624; *Crews v. Farmers' Bank*, 31 Grat. 348.

²⁰ *Mechanics' Banking Ass'n v. Place*, 4 Duer, 212; *Curtis v. State Bank*, 6 Blackf. 312.

²¹ See next note.

²² *Walker v. Stetson*, 14 Ohio St. 89. For residence, see *Fisher v. Evans*, 5 Bin. 541.

²³ *Aiken v. Marine Bank*, 16 Wis. 679. The delivery should be to a proper officer, such as a cashier; but the notice may be directed to the cashier (*Coffman v. Bank of Kentucky*, 41 Miss. 212) or the president. See first case in this note.

²⁴ *Merrick v. Plank Road Co.*, 11 Iowa, 74.

²⁵ *American Nat. Bank v. Junk*

Co., 94 Tenn. 624; *Crews v. Farmers' Bank*, 31 Grat. 348.

²⁶ *Hubbard v. Matthews*, 54 N. Y. 43. Here the firm was dissolved.

²⁷ *Fourth Nat. Bank v. Altheimer*, 91 Mo. 190.

²⁸ *Coster v. Thomason*, 19 Ala. 717. And see last note.

²⁹ *Dabney v. Stidger*, 4 Smedes & M. 749; *Slocomb v. De Lizardi*, 21 La. Ann. 355. And see note 17, § 276, *post*.

³⁰ See the cases in last two notes, and *Nott v. Downing*, 6 La. 680.

³¹ *Kleinmann v. Bormstein*, 32 Mo. 311.

³² *Williams v. Brailsford*, 25 Md. 126.

³³ *People v. North River Bank*, 62 Hun, 484.

the purpose of attending to any regular business, was not considered a place of business for him.³⁴

The residence of a person at a particular time is his usual place of abode at that time.³⁵ It may be a residence, a boarding house or a hotel. If the residence be a hotel, the notice may be left with the clerk if the person is not in his room,³⁶ although in Arkansas there has been some doubt thrown upon this proposition at an earlier day, owing probably to the extremely barbarous character of the hotels to which the judges were accustomed.³⁷ Where the person to be served lives at a boarding house, if after inquiry he be found not to be there,³⁸ the notice may be left with a fellow-boarder, and for the same reason with the person in charge, with directions to deliver it to him.³⁹ Where the service is made at a residence and the house is found closed with no one there, the notice may be left there;⁴⁰ but if the indorser has a place of business in the city, perhaps some inquiry should be made there.⁴¹ If any one is found in the house, even a slave in old days,⁴² the notice may be left with that person, with directions to deliver it.⁴³ Where the residence has been changed, the rule to follow will be found in a later section.⁴⁴

³⁴ Stephenson v. Primrose, 8 Port. 155.

³⁵ Wachusset Nat. Bank v. Fairbrother, 148 Mass. 181.

³⁶ Bradley v. Davis, 26 Me. 45. The case shows that the barkeeper was the person with whom left.

³⁷ Ashley v. Gunton, 15 Ark. 415. Any judge ought to be willing to concede that the clerk of any reasonably kept hotel is the proper person with whom to leave a notice for a person at the hotel.

³⁸ See the next note. But if the place be a hotel or boarding house it should appear that the person to be served is stopping there. Kerr v. Roberts, 5 Wkly. Notes Cas. 25.

³⁹ Bank of U. S. v. Hatch, 6 Pet. 250.

⁴⁰ Isbell v. Lewis, 98 Ala. 550; Greatrake v. Brown, 2 Cranch, C. C. 541.

⁴¹ Commercial Bank v. Strong, 28 Vt. 316. The great weight of authority is to the contrary.

⁴² Colored servant. Coulon v. Champlin, 15 La. 544. See Bank of U. S. v. Merle, 2 Rob. (La.) 117.

⁴³ See Bank of U. S. v. Hatch, 6 Pet. 250. Giving the notice to a daughter at the house is good, the indorser being away, although it was shown there were two daughters, one quite young. Bank of Kentucky v. Duncan, 4 Bush, 294.

⁴⁴ See § 281, *post*.

§ 275. **Service at a place designated.**— The place to serve a party with notice may be designated by him, and such direction remains good until it is countermanded;¹ and a notice left at that place will be good, although an actually personal service would be equally good. And where the indorser writes his address upon the paper under his name, this will be an implied direction as to the place of giving notice, and a notice left at that place in proper manner will be sufficient.² But merely finding the indorser's address under his name will not justify a notice left at such address, unless it is shown to be his residence or place of business, and that the notice was left in a proper manner at that place.³ If the note has been negotiated by an agent for the indorser, the directions of the agent as to the indorser's address will be binding upon the indorser.⁴ This rule ought to be qualified, however, by the statement that if the holder knows that the address has been changed and the person has removed from the place designated, he ought to follow the new address in serving the notice.⁵ This matter of the designation of the place of address will be further considered under the head of the proper place to which to direct notice by mail.⁶ But the whole subject of service of notice, both as to place and time, is governed by the general consideration that any agreement made between the maker of

But in the following case the notice was held bad. The server called at the house quite early and the house was closed, but he handed the notice to a servant apparently, who, however, was not connected with the family. *Dufour v. Morse*, 9 La. 333. The person to be served was not shown to be absent. *Adams v. Wright*, 14 Wis. 408 (given to boy in yard not good). Giving a notice to the indorser's son, who said he was going home and would deliver, is not good unless it be shown to have been delivered. *Paterson Bank v. Butler*, 12 N. J. Law, 268.

¹ *Eastern Bank v. Brown*, 17 Me. 356.

² *Baker v. Morris*, 25 Barb. 138; *Davis v. Bank of West Tennessee*, 4 Sneed, 390; *Morris v. Husson*, 4 Sandf. 93; *Farmers' Bank v. Battle*, 4 Humph. 86.

³ *Davenport v. Gilbert*, 4 Bosw. 532, 6 Bosw. 179.

⁴ *Catskill Bank v. Stall*, 15 Wend. 364.

⁵ This would seem to be the proper rule.

⁶ See § 279, *post*.

the note or the drawer of the bill as to the service of notice, known to the indorser at the time he indorses, will be binding upon him as well.⁷

§ 276. To whom notice is to be given.—In the matter of serving notices, the notice, however it comes to the person to be charged, whether by mail or by messenger, from the holder or his agent or from other prior party, must be given to him or to his agent duly authorized to receive notice, or due diligence must be shown in trying to give the notice. The result of the death of the one to be served upon the serving of the notice will be considered later.¹ The cases which have been considered of service by leaving the notice with some person at the house or place of business of the person to be charged² are, in the view of some courts, cases of service upon agents with implied authority, or perhaps agents from necessity.³ But that is not a correct view, for it does violence to well-settled rules of law as to agency, to hold that such service is had upon an agent. Rather are such cases simply a method of service provided by the law merchant from the necessities of commerce, just as statutes provide for constructive service of process by leaving it at the place of residence of the defendant. But in neither case is the person with whom the notice or process is left an agent. Such an idea requires us to consider the desk on which the notice is left, the door under which it is pushed, or the letter-box in which the notice is mailed as an agent. The cases of service upon an agent are always cases of actual agency. Service upon such an agent is good, provided his authority be shown.⁴ The authority, however, to draw

⁷ Such are the cases of customary service by mailing.. See § 288, *post*, note 5.

¹ See § 287, *post*.

² See the cases cited in § 274. *Jacobs v. Turner*, 2 La. Ann. 964.

³ Strictly an agent is one who brings the principal into contractual relations with another. A serv-

ant does not. Therefore, since no express authority exists in these cases, the agency must arise either by estoppel or from necessity.

⁴ *Edwards v. Thomas*, 66 Mo. 468. This would have been a good case of actual agency by estoppel, had the holder not known that the agency no longer existed. See New

a bill will not imply, it is said, an authority in the agent to receive notice of dishonor,⁵ although a demand on such an agent who made a note has been held good⁶ in a concurring opinion, and if the rule is sound as to a demand it is sound as to the notice.⁷

In the case of joint indorsers or joint drawers, not partners, notice in order to hold either must be served upon both,⁸ unless the case has been modified by a waiver,⁹ or unless the common law as to the release of all joint obligors by releasing one of them has been modified by statute; in which latter case, the reason of the rule failing, the rule itself ought to fail.¹⁰ But it is needless to say the fact of a joint indorsement must appear upon the face of the instrument itself, unless the holder had notice of the fact of joint indorsement; but even then he would not be bound by the fact of joint indorsement if it contradicted what appeared upon the instrument.¹¹ The notice to joint indorsers need not, however, be addressed to both.¹² Partnerships are not considered cases of joint obligation, because each partner

York Contracting Co. v. Selma Sav. Bank, 51 Ala. 305. The agency in this case can arise by estoppel or a holding out. See Wilkins v. Commercial Bank, 6 How. (Miss.) 217.

⁵ Hockaday v. Skeggs, 2 Phila. 268.

⁶ Luning v. Wise, 64 Cal. 410.

⁷ The theory of the latter case seems the best, but the authority seems to be to the contrary. The authorities are cited in Hockaday v. Skeggs, *supra*. Valk v. Galliard, 4 Strobb. 99; La. St. Bank v. Ellery, 4 Mart. (N. S.) 87, where the authority given was to indorse and to do all acts necessary in connection therewith; De Lizardi v. Pouverin, 4 Rob. (La.) 393. But a notice to a general agent of a person is good (Hestres v. Petrovic, 1 Rob. (La.) 119; Wilson v. Senier, 14 Wis. 380); or general agent of a corporation.

Bank of Auburn v. Putnam, 1 Abb. Dec. 80 (here there was an estoppel).

⁸ Gaunt v. Jones, 1 Cranch, C. C. 210; State Bank v. Slaughter, 7 Blackf. 133. See Shepherd v. Hawley, 1 Conn. 367. But see as to anomalous indorser, Legg v. Vinal, 165 Mass. 555.

⁹ One joint indorser might waive notice.

¹⁰ If the statute provides that one joint obligor can be released it would control. Some courts permit the obligee to reserve his right to hold the other joint obligor not released.

¹¹ Two men who sign separately are so bound regardless of their intention.

¹² Cayuga Co. Bank v. Warden, 6 N. Y. 19.

may bind his firm in regard to a transaction which is truly a partnership transaction,¹³ and some courts wrongly regard all joint indorsements as partnerships *pro hac vice*.¹⁴ Including these last-named cases as partnership transactions, the rule is general that notice to the partnership is notice to all its members.¹⁵ Notice to a partnership is given by giving notice to any one of the general partners.¹⁶ The notice may be served on the common member of two firms, the one being indorser, the other being the holder.¹⁷ But in case the partnership has been dissolved the agency remains, and a notice to one partner binds them all;¹⁸ and a notice according to the previous directions of one partner binds the partnership, certainly before and on principle after dissolution.¹⁹ In case the partnership has been dissolved by death the notice will be good served upon a surviving partner,²⁰ but it will not be good if served upon the personal representative of a deceased partner;²¹ for the notice to the surviving partner fixes the liability of the firm, and hence of the estate of a deceased partner, the notice to the administrator being necessary only as the presentation of a claim.²² But where a drawer of a bill upon a firm was once a member of that partnership, although at the time he drew the bill he was

¹³ *Wheeler v. Maillot*, 20 La. Ann. 75. the agent. *Bliss v. Nichols*, 94 Mass. 443. *

¹⁴ *Dodge v. Bank of Kentucky*, 2 A. K. Marsh. 610; *Higgins v. Morrison*, 4 Dana, 100. But this is not the correct rule. *Sayre v. Frick*, 7 Watts & S. 383; *Boyd v. Orton*, 16 Wis. 495; *People's Bank v. Keech*, 26 Md. 521; *Willis v. Greene*, 5 Hill, 232. In fact, if the joint indorsers were actually partners, the fact that they indorsed as individuals and not as a firm ought to show their intention to be held only jointly; but the law is not so.

¹⁵ See cases in note 18, *infra*. ¹⁷ *Riddle v. McBeth*, 4 W. L. M. 153. ¹⁸ *Dabney v. Stidger*, 4 Smedes & M. 749; *Slocumb v. De Lizardi*, 21 La. Ann. 355; *Coster v. Thomason*, 19 Ala. 717. See *Nott v. Downing*, 6 La. 680, and *Hume v. Watt*, 5 Kan. 34. And see notes 26-28, § 274, *ante*.

¹⁹ *Magee v. Dunbar*, 10 La. 546.

²⁰ See first two cases in note 18.

²¹ *Locke v. Bank of Tennessee*, 6 Humph. 51. See the cases on demand, § 248, *ante*.

¹⁶ Dormant partners are not within the rule, but the service is good on ²² *Locke v. Bank of Tennessee*, 6 Humph. 51.

no longer a partner, which fact was not known to the holder, who considered the drawer still one of the firm, and therefore not entitled to notice of non-payment, the holder was held to have released such drawer by failing to give him notice.²³

Where an indorser, after making the indorsement, has made an assignment of all his property for the benefit of creditors, notice of dishonor must nevertheless be given to him and not to the assignee;²⁴ but there is authority for saying that notice to the assignee will bind the indorser who is assignor.²⁵ But a reasonable compromise between the two positions would be to hold that the assignee is agent of the assignor to wind up his business while he is engaged about that matter, and if notice is given to him at the place of business where the assignor-indorser's affairs are being wound up, it would be a good notice to the indorser.²⁶ Yet at the same time, as in all other cases of agency, notice to the assignor-indorser himself would be good to bind the assigned property; but this is wrongly said not to be true, unless the holder had no notice of the assignment.²⁷

§ 277. Notice to successive obligors.—The question of the person to whom notice is to be given has hitherto been considered as if the holder were himself giving notice. But the theory of commercial paper is that it is a succession of contracts, each party separately putting his name to the paper becoming the maker of a new contract, all of which contracts pass to the holder of the paper, who has a separate contract with each party to the paper, and each holder and

²³ Taylor v. Young, 3 Watts, 339.

²⁴ House v. Vinton Nat. Bank, 43 Ohio St. 346.

²⁵ American Nat. Bank v. Junk Bros. Co., 94 Tenn. 624; Callahan v. Bank of Ky., 82 Ky. 231.

²⁶ See Bliss v. Nichols, 94 Mass. 448; Casco Nat. Bank v. Shaw, 79 Me. 370; Bank of America v. Shaw, 142 Mass. 290.

²⁷ Donnell v. Lewis Co. Sav. Bank, 80 Mo. 165. This seems to be the conclusion from what the court holds in this case. The statement, however, is *dictum*, because the notice was held good, the holder having no knowledge of the assignment.

indorser in succession is bound to each holder subsequent to himself by a series of separate contracts, and has bound to him each preceding party by a series of separate contracts.¹ Each party to the paper has the right to choose which of these contracts he will enforce—any or all. Therefore the holder may give notice to his immediate indorser,² or he may give notice to any indorser he chooses,³ or to the drawer or maker.⁴ He is not required to give notice to any particular indorser.⁵ Therefore a second indorser notified cannot defend on the ground that a party to the paper prior to himself was not notified.⁶ It is the duty of each indorser to protect himself by giving notice to any or all of the parties prior to himself.⁷ But every notice given to a party to the paper inures to the benefit of every one on the paper who stands between the person giving the notice and the one to whom notice is given.⁸ Even if the holder tries to notify a party to the paper and fails, yet a notice received in due time by that party from a subsequent party to the paper properly notified will bind him to that subsequent party and all others between them,⁹ as well as to all other parties subsequent to that subsequent party.¹⁰ The holder may mail all the notices to the last indorser for service,¹¹ and that indorser

¹ See the following cases in the notes to this section.

² Griffith v. Assmann, 48 Mo. 66; West River Bank v. Taylor, 34 N. Y. 128.

³ Henry v. State Bank, 3 Ind. 216; Crane v. Trudeau, 19 La. Ann. 307.

⁴ See the last note. Sometimes a statute requires notice to all prior parties. See note 29, *infra*.

⁵ Unless a statute requires all to be served. See note 29, *infra*.

⁶ Boteler v. Dexter, 20 D. C. 26; Henry v. State Bank, 3 Ind. 216; Valk v. Bank of State, 1 McMul. Eq. 414.

⁷ Lawson v. Farmers' Bank, 1 Ohio St. 206; Renshaw v. Triplett, 23 Mo. 213; Crocker v. Gitchell, 23

Me. 392; Watson v. Templeton, 11 La. Ann. 137; Spencer v. Ballou, 18 N. Y. 327.

⁸ Mead v. Engs, 5 Cow. 303; Jordan v. Ford, 7 Ark. 416; Grand Gulf Co. v. Barnes, 12 Rob. (La.) 127.

⁹ Marr v. Johnson, 9 Yerg. 1.

¹⁰ Westfall v. Farwell, 13 Wis. 504; Linn v. Horton, 17 Wis. 151. But if the notice to a certain indorser was excused, another party subsequent to the one not notified cannot hold the unnotified party liable on the strength of the excuse, if he could himself have given the notice. Beale v. Parrish, 20 N. Y. 407.

¹¹ Pate v. State Bank, 3 Ind. 176; Wood v. Callaghan, 61 Mich. 402.

may mail to his indorser,¹² and so on through all the parties; and each party, who receives notice in due time under this method, even though it be circuitous, and even though he would have received notice sooner if it had been mailed directly to him, will be held.¹³ All indorsements are on the same level under this rule, whether they are for value or for collection, and all persons who hold the paper for collection undorsed.¹⁴ The indorsee for collection, even under an unsigned transfer, may, acting as holder, send the notice to his indorser for service,¹⁵ the residence of the parties being perfectly immaterial as to the right.¹⁶ The rule has been extended to include an agent, and the agent may have the same right to send notices to his principal without inquiry as to residences as if he were an indorsee,¹⁷ or he may himself serve the notices upon any or all the parties¹⁸ if he be authorized to do so,¹⁹ and the presumption will be as against a party notified by him that he is so authorized.²⁰ Yet, if he were expressly forbidden to do so, there would be nothing to prevent the principal from giving the notices if he did it in due time, even if his agent had tried to do so but failed.²¹ If the paper passes through a succession of indorsees for collection, each agent or bailee is to be treated as a holder for the purposes of this rule,²² although there has been some

¹² Wood v. Callaghan, 61 Mich. 402; Butler v. Duval, 4 Yerg. 265.

¹³ Triplett v. Hunt, 3 Dana, 126; Church v. Barlow, 9 Pick. 547. And see cases in note 16, *infra*.

¹⁴ Eagle Bank v. Hathaway, 5 Met. 212; Burnham v. Webster, 19 Me. 232; Blakelee v. Hewitt, 76 Wis. 341.

¹⁵ Rosson v. Carrol, 90 Tenn. 90; Bowling v. Harrison, 6 How. 248; Big Sandy Nat. Bank v. Chilton, 40 W. Va. 491; First Nat. Bank v. Smith, 132 Mass. 227 (unsigned).

¹⁶ West River Bank v. Taylor, 34 N. Y. 128; True v. Collins, 85 Mass. 438; Fitchburg Bank v. Perley, 84 Mass. 433; First Nat. Bank v. Smith, 132 Mass. 227.

¹⁷ Rosson v. Carrol, 90 Tenn. 90; Bowling v. Harrison, 6 How. 248; Hartford Bank v. Stedman, 3 Conn. 489; Colt v. Noble, 5 Mass. 167 (foreign bill); Bank of U. S. v. Goddard, 5 Mason, 366; Morgan v. Van Ingen, 2 Johns. 204. The agent may give the notice in his own name. Dexter v. McGlynn, 99 Cal. 143.

¹⁸ Griffith v. Assmann, 48 Mo. 66; Wood v. Callaghan, 61 Mich. 402.

¹⁹ See the next note.

²⁰ Payne v. Patrick, 21 Tex. 680.

²¹ This particular case does not seem to have arisen.

²² See cases in notes 17 and 18.

doubt as to an agent who was not indorsee.²³ Since, therefore, the holder has the right to assume that the agent for collection or the indorsee for collection will transmit the notices to himself for service, he is not negligent in not giving the agent any information whatever as to the residences of the parties,²⁴ unless he direct that agent or indorsee for collection to serve the notices, when he should give the agent all the information in his possession in order to escape the imputation of a want of due diligence.²⁵ The party to the paper desiring to serve a notice may send the notice to a third party, a stranger to the paper, to serve where he does not know the address, and if that third person acts with due diligence the service is good.²⁶ But if the person knew the address, the sending of the notice to a third person not a party to the paper would not be due diligence.²⁷ The second case cited in the last note applies wrongly a sound principle by mistaking the facts. There the president of the bank, who had received in his private capacity knowledge of the residence of a person to be charged with notice, was not in the bank, and took no part when the notice was sent, and his knowledge was clearly therefore not imputable to the bank; so the case is one of that numerous list where courts have failed to understand properly the rules of agency.²⁸ Sometimes statutes require all indorsers to be served, and thus modify the preceding rules.²⁹

²³ Fish v. Jackmann, 19 Me. 467, Slack v. Longshaw, 8 Ky. Law R. 166. But the other rule is correct. Lawson v. Farmers' Bank, 1 Ohio St. 206; Ellis v. Commercial Bank, 7 How. (Miss.) 294. See Tunno v. Lague, 2 Johns. Cas. 1, and note 17, *supra*.

²⁴ See Bartlett v. Isbell, 31 Conn. 296. But Clarke v. Ward, 4 Duer, 206, seems *contra*, and so seems to be First Nat. Bank v. Farneman, 93 Iowa, 161, but they are wrong.

²⁵ See Lawrence v. Meller, 16 N. Y. 235; Smith v. Fisher, 24 Pa. 222.

²⁶ Sewell v. Russell, 3 Wend. 276; Lafayette Bank v. McLaughlin, 4 W. L. J. 70. It was held in the first case above that where the notice was sent to an agent to serve, he has not one day after receipt merely to put in the mail. See Carmena v. Dougherty, 1 La. Ann. 369.

²⁷ Carmena v. Dougherty, 1 La. Ann. 369; Central Nat. Bank v. Levin, 6 Mo. App. 543. But the first case is wrong, since the notice was sent to the holder.

²⁸ See § 112, *ante*.

²⁹ Bowling v. Arthur, 34 Miss. 41.

§ 278. **By whom notice is to be given.**—The notice may be given by the holder or his agent.¹ It is not material whether the one or the other gives the notice.² Under this rule the notary employed is an agent, which fact may be inferred from his acting.³ The cashier of a bank holding for collection is an agent of the bank to give notices.⁴ The indorsee for collection has been called also an agent under this rule; but as we have elsewhere demonstrated, a bank holding paper for collection is a bailee, and therefore an actual holder, not an agent.⁵ Notice given by the acceptor⁶ or maker, as agent of the holder, inures to the benefit of other parties to the bill.⁷ The word “holder” includes any one through whose hands the bill or note has passed,⁸ even an assignor without indorsement.⁹ Each one of them may give notice to all or any parties prior to themselves.¹⁰ In the last section was necessarily considered the giving of notices by successive obligors.¹¹ We saw that an agent could give notice to his principal instead of sending notices,¹² or he might give notice himself in his own name¹³ or in his principal’s name.¹⁴ The holder can give notice to any or all the prior parties.¹⁵ Each indorser must take precaution to see that all prior parties whom he desires to hold are

See *Jarnagin v. Stratton*, 95 Tenn. 619, as to the effect of a statute making all joint obligations joint and several. It does not change this rule.

¹ *Burke v. McKay*, 2 How. 66; *Harris v. Robinson*, 4 How. 336.

² See cases in last note.

³ *Burbank v. Beach*, 15 Barb. 326. See *Payne v. Patrick*, 21 Tex. 680.

⁴ *State Bank v. Vaughan*, 36 Mo. 91.

⁵ See § 171, *ante*, and *Manchester Bank v. Fellows*, 28 N. H. 302.

⁶ *Union Bank v. Grimshaw*, 15 La. 321; *Brailsford v. Williams*, 15 Md. 150. But the allegation must be that the maker or acceptor acted

as agent of the holder, and acted in due time. See *Sebree Deposit Bank v. Moreland*, 96 Ky. 150.

⁷ See cases in last note.

⁸ *Glasgow v. Prattle*, 8 Mo. 336; *West River Bank v. Taylor*, 34 N. Y. 128; *Stafford v. Yates*, 18 Johns. 327.

⁹ He would be on the same footing as a holder to whom the note was unindorsed. See *Pate v. State Bank*, 3 Ind. 176.

¹⁰ See preceding section.

¹¹ See last section.

¹² See last section.

¹³ See note 17 to preceding section.

¹⁴ See § 270, *ante*.

¹⁵ See preceding section.

notified,¹⁶ unless a statute should change the rule.¹⁷ Notice to a prior indorser from the holder inures to the benefit of the subsequent indorser,¹⁸ and notice by a subsequent to a prior indorser inures to the benefit of the holder.¹⁹ It has been held that notices to all the prior parties properly addressed, inclosed in a letter to the last indorser, will hold all the prior indorsers to the holder, although the last indorser never received the letter, and the letter was lost in the mail.²⁰ Other authority seems to require that the notices be actually transmitted with proper diligence to the prior indorsers.²¹ This modification is correct to this extent, that no intervening party be guilty of laches, and therefore the first statement of the rule is undoubtedly correct, even if the holder had knowledge as to the residences. If, however, the last indorser received the letter it must appear that he remailed or served the notices,²² either to his prior indorser or the parties separately, and the same rule as to miscarriage in the mail would apply.²³ All the cases in the preceding section should be consulted in connection with this section. Notices given by those who are strangers to the paper are

¹⁶ See preceding section. But if a subsequent party not notified gives notice to a prior party, the notice does not inure to the other parties to the paper. *Brown v. Ferguson*, 4 Leigh, 37, *semble*. This decision is wrong. The rule ought to be that as soon as it appears that the holder mailed the notice under cover to the last indorser, then the indorser should be called upon to show that he did not receive it, and to show laches. See notes 20 and 21, and *Stafford v. Yates*, 18 Johns. 337.

¹⁷ See note 29 to preceding section.

¹⁸ See preceding section.

¹⁹ See preceding section.

²⁰ *Wamesit Bank v. Buttrick*, 11

Gray, 387. Due diligence had been used to notify the prior parties. If the notices had not been lost, then the laches of an intervening holder would defeat recovery. *Farmers' Bank v. Turner*, 2 Litt. 13; *Holland v. Turner*, 10 Conn. 308.

²¹ See *Aldine Mfg. Co. v. Warner*, 96 Ga. 370; *Stix v. Matthews*, 63 Mo. 371; *Van Brunt v. Vaughan*, 47 Iowa, 145.

²² *Renshaw v. Triplett*, 23 Mo. 213; *Ohio Life Ins. Co. v. McCague*, 18 Ohio, 54; *Holland v. Turner*, 10 Conn. 308.

²³ There is no doubt that a notice properly mailed by a proper person is notice.

wholly void;²⁴ but a liberal presumption will be indulged in favor of the authority of the giver of notice.²⁵

§ 279. **Place to direct by mail.**— We have hereinbefore discussed the place of service where the service is not to be made by mail and the residence is known.¹ It will be necessary now to consider to what postoffice the notice should be directed when the postoffice address is known. The propriety of sending a letter to a discontinued postoffice has been considered in a former section.² It should first be observed that notice by mail is not compulsory, for notice may be sent by messenger, and if the messenger exhibit reasonable diligence in transmitting it the service is perfectly good.³ In the next place the particular postoffice which it is desired to address may be called by more than one name; and if that be the case the use of either name is proper.⁴ Again, a particular place may have more than one postoffice, and a notice directed to the place without indicating which postoffice would be sufficient, unless it be shown that the holder or his agent serving was aware that the recipient of the notice used one of the postoffices exclusively, or could have known it by reasonable diligence.⁵ The place to be addressed may be a district of country with a postoffice in it, and if the indorser lives in the district, notice to him through the postoffice for the district would be sufficient, unless the holder knew that he made use of a post-

²⁴ *Lawrence v. Miller*, 16 N. Y. 235.

²⁵ *Payne v. Patrick*, 21 Tex. 680.

¹ See § 274, *ante*.

² See § 273, *ante*.

³ *Bank of Columbia v. Lawrence*, 1 Pet. 578; *Hazelton Coal Co. v. Ryerson*, 20 N. J. Law, 129. But the special messenger differs from the mail in that notice put into the mail is good, but notice given to a special messenger proves nothing until it is shown that the messenger exercised diligence. *Jarvis v. St. Croix Mfg. Co.*, 23 Me. 287.

⁴ *Geneva Bank v. Howlett*, 4 Wend. 328.

⁵ *Morton v. Westcott*, 8 Cush. 425; *Roberts v. Taft*, 120 Mass. 169; *Manchester Bank v. White*, 30 N. H. 456; *Downer v. Remer*, 21 Wend. 10, 23 Wend. 620; *Bank of Manchester v. Slason*, 13 Vt. 334; *Burlingame v. Foster*, 128 Mass. 125. If the postoffice has two names, either name may be used (*Bank of Geneva v. Howlett*, 4 Wend. 328); but a notice addressed to a county which has more than one postoffice is bad. *Bank of Ill. v. Taylor*, 7 T. B. Mon. 576.

office outside of that district.⁶ If the notice to be addressed is to a city of considerable size, it is not necessary to address the person receiving the notice by his street and house number,⁷ unless it be shown that the holder or his agent for service knew the house number and the street, or unless the address has been indicated in such a manner, *e. g.*, upon the paper, that the holder ought to have known the number.⁸ There may be two places in different states with the same name; if one of those places be in the same state as the place where the notice is sent, the state need not be named in the address, but otherwise it should be.⁹ Subject to the above limitations the notice should be sent, in the absence of a controlling agreement, to the postoffice of the place of actual residence of the indorser or other person to be charged with notice, provided that place be known to be the residence of the party or represented by him to be such.¹⁰ This rule is to be followed regardless of the place where the bill or the note is dated.¹¹ Sending the notice in this manner will always be considered sufficient if the mail is a proper method of service in the particular case.¹² People, however, will be found residing in one place part of the year and in another place part of the year, and it would seem to be correct to address the postoffice of actual residence, regardless of the domicile.¹³ Yet mere absence from his family does not constitute a change of residence under this rule.¹⁴ But cases must frequently arise where the indorser lives away

⁶ *Rand v. Reynolds*, 2 Gratt. 171.

⁷ *True v. Collins*, 85 Mass. 438; *Webber v. Gotthold*, 28 N. Y. Supp. 763.

⁸ *Bartlett v. Robinson*, 9 Bosw. 305, 39 N. Y. 187.

⁹ *Beckwith v. Smith*, 22 Me. 125.

¹⁰ *Young v. Durgin*, 15 Gray, 264; *Robinson v. Barber*, 3 Am. Law J. (N. S.) 59; *Lewiston Falls Bank v. Leonard*, 43 Me. 144 (represented by indorser to be his postoffice). See also *Pierce v. Pendar*, 5 Met. 352.

¹¹ *Fitler v. Morris*, 6 Whart. 406.

¹² See § 272, *ante*. It is immaterial that the notice was never received. § 273, *ante*, note 1.

¹³ This is the rule as stated in *Young v. Durgin*, 15 Gray, 264. See *Goodwin v. McCoy*, 13 Ala. 271; *Wooley v. Lyon*, 117 Ill. 244; *McMurtrie v. Jones*, 3 Wash. C. C. 206; *Gist v. Lybrand*, 3 Ohio, 307.

¹⁴ *Curtis v. State Bank*, 6 Blackf. 312; *Walker v. Stetson*, 14 Ohio St. 89.

from a place with a postoffice. In that contingency the place to send the notice through the mail, if the server does not know where the person to be served receives his mail, is the postoffice nearest to the residence of the indorser or drawer.¹⁵ In order to determine the nearest postoffice it is said that the holder may consider the nearest postoffice the one from which he will get mail the soonest, not necessarily the postoffice nearest in point of distance.¹⁶ But the case must be very rare where such a condition of affairs is likely to exist. It is the safer rule to choose the postoffice that is the nearer in point of distance, and that choice is proper though the postoffice be in another state.¹⁷ But where the nearer postoffice was separated from the indorser's residence by a wide and rapid river, while another postoffice, though two miles farther away, was on the same side of the stream, the choice of the latter place of address was justifiable.¹⁸ This decision should have been put upon the ground that the holder had the right to assume that the indorser received his mail at the latter place. In yet another case, where the indorser lived three miles from the nearest postoffice and eleven miles from the place of demand, it was seemingly held, by an apparently foolish court, that the place of demand was the postoffice of the indorser, and that service by mail was improper.¹⁹ If it were shown that the holder knew that the indorser did not get mail at his nearest postoffice, but did get it from the postoffice at the place of demand, this decision might be upheld.²⁰ Another court has held that where the drawer or indorser lives outside of the city the notice may be by mail to the city postoffice, if it is the nearest

¹⁵ *Forbes v. Omaha Nat. Bank*, 10 Neb. 338; *Hazelton Coal Co. v. Ryerson*, 20 N. J. Law, 129; *Reid v. Payne*, 16 Johns. 218; *Seneca Co. Nat. Bank v. Neass*, 3 N. Y. 442, 5 Denio, 329; *Bank of Columbia v. Magruder*, 6 Har. & J. 172; *Woods v. Neeld*, 44 Pa. 86.

¹⁶ *Bank v. Lane*, 10 N. C. 453; *Bank of Louisiana v. Corl*, 3 La. Ann. 273.

¹⁷ *Harrison v. Bowen*, 16 La. 282; *Pollard v. Cook*, 4 Rob. (La.) 199.

¹⁸ *Bank of Louisiana v. Corl*, 3 La. Ann. 273.

¹⁹ *Nashville Bank v. Bennett*, 1 Yerg. 166.

²⁰ See the cases cited in note 28, *infra*.

postoffice, and if he has no place of business in the city.²¹ And there are decisions denying this rule as to an indorser who lived one and a half miles,²² a few miles,²³ but applying it to indorsers who live four or five miles,²⁴ and nine miles out of the city.

But the rule of the nearest postoffice is only a rule of presumption. For a notice that is directed to the postoffice where the person receiving notice is in the habit of receiving his mail will unquestionably be sufficient regardless of the rule of the nearest postoffice.²⁵ And if the indorser should be in the habit of receiving mail at more places than one, notice to either of these places is sufficient;²⁶ yet in Louisiana (a state where almost any kind of a decision upon this phase of the law may be found, and where the multitudinous decisions lead one to imagine that the most active pursuit of the population was the indorsing of notes, which the makers never paid), the court thought an indorser ought to be protected against a postoffice twenty-two miles away from his residence, even though he was foolish enough to receive his mail there sometimes.²⁷ If now the holder or his agent knows that the indorser is in the habit of receiving his mail at a certain postoffice, the notice may be directed there even if it be not the nearest;²⁸ but he is not compelled, it appears, to

²¹ See note 8 to § 272, *ante*.

²² *Forbes v. Omaha Nat. Bank*, 10 Neb. 338. And see notes 6-8, § 272, *ante*.

²³ *Ireland v. Kip*, 10 Johns. 490, 11 Johns. 231. See notes 6-8, § 272, *ante*.

²⁴ See notes 6-8, § 272, *ante*.

²⁵ *Bank of U. S. v. Carneal*, 2 Pet. 543; *Glasscock v. Bank of Mo.*, 8 Mo. 443; *Mercer v. Lancaster*, 5 Pa. 160; *Nevins v. Bank*, 10 Mich. 547; *Montgomery Co. Bank v. Marsh*, 11 Barb. 645, 7 N. Y. 481; *Shaylor v. Mix*, 86 Mass. 351; *Grief v. McDaniel*, 14 La. Ann. 155; *Farmers' Bank v. Battle*, 4 Humph. 86;

Walker v. Stetson, 14 Ohio St. 89; *Hazelton Coal Co. v. Ryerson*, 20 N. J. Law, 129.

²⁶ *Bank of U. S. v. Carneal*, 2 Pet. 543; *Follain v. Dupre*, 11 Rob. (La.) 454; *Menzies v. Farmers' Bank*, 3 Ky. Law R. 822; *Crawford v. Read*, 9 Rob. (La.) 243. See *Shelburne Falls Bank v. Townsley*, 107 Mass. 444; *Mechanics' Bank v. Compton*, 3 Rob. (La.) 4.

²⁷ *Pritchard v. Scott*, 7 Mart. (N. S.) 491.

²⁸ *Follain v. Dupre*, 11 Rob. (La.) 454; *Grand Gulf Co. v. Barnes*, 12 Rob. (La.) 127; *Bank of Illinois v. Taylor*, 7 T. B. Mon. 579; *Reid v.*

do so. But if the holder does not know the fact he needs not inquire, but should follow the rule of mailing to the nearest postoffice.²⁹

There is yet another consideration that will govern the rule of mailing to the postoffice nearest the residence of the recipient of notice. While, as we have seen, the presence of an address for the indorser, not put upon the note by the indorser, will not justify the sending of notice there without inquiry, a direction to the holder to send notice to a certain place can be deviated from only at the risk of the holder.³⁰ This direction as to notice will be reasonably and liberally and not strictly construed.³¹ It governs the rule as to the nearest postoffice,³² and the accustomed postoffice as well. The direction need not be given necessarily by the indorser, for the order to direct notice given by the drawer for an accommodation indorser,³³ or the direction as to notice to indorser given by the person who presents the paper for discount, apparently for the indorser, is binding upon the indorser.³⁴ But the direction as to notices must be given to the holder. He cannot take advantage of a direction given to the postmaster as to the forwarding of mail, in order to avoid the force of the rule as to the nearest postoffice.³⁵

But it should not be forgotten that these rules are only compulsory when the indorser or drawer has not received

Payne, 16 Johns. 218; Seneca Co. Nat. Bank v. Neass, 3 N. Y. 442.

²⁹ See last case in last note and Taylor v. Bank of Illinois, 7 T. B. Mon. 576.

³⁰ Paterson Bank v. Butler, 12 N. J. Law, 268. See as to address on paper, Bowling v. Harrison, 6 How. 248.

³¹ Menzies v. Farmers' Bank, 3 Ky. Law R. 822. See Follain v. Dupre, 11 Rob. (La.) 454; Priestley v. Bislant, 9 Rob. (La.) 425.

³² Carmena v. Bank of La., 1 La. Ann. 369; Crowley v. Barry, 4 Gill, 194.

³³ Bank of Utica v. Bender, 21 Wend. 643.

³⁴ Bank of Utica v. Davidson, 5 Wend. 587.

³⁵ Ireland v. Kip, Anth. N. P. 195. In the upper courts the point was missed. This point would seem to be the only ground upon which this decision can be justified. But the point is really immaterial. It proves that the person has been getting his mail at the place, and if the holder does not know of the change, mailing to the place is good. McGrew v. Toulmin, 2 Stew. & P. 428.

notice in due time. If he has received such notice in due time from the holder, or from some other party to the paper, as hereinbefore stated, it is immaterial how the notice was directed,³⁶ or to what place it was directed,³⁷ or who conveyed it,³⁸ or where it was received.³⁹

§ 280. Absence from home.— Incidentally, in the preceding section upon personal service, the effect of a person's absence from his home was noticed. The rule may be stated to be that the temporary absence of a person from his residence does not require any different method of service whether the absence be for several days or several months.¹ If his place of business or his residence is kept open, service there otherwise good ought in all cases to be upheld.² If the person is traveling, it would be absurd to expect the holder to pursue him from place to place with a notice. It is the duty of the person leaving home to make provision for proper attention to his business while he is away. The rule is reasonable and proper from every standpoint. It has been so held as to a person traveling in Europe,³ and as to a person who has accepted a consulship,⁴ and in a number of other contingencies, such as temporary absence from one's boarding house⁵ or office⁶ or residence.⁷ The rule ought to be that in case of absence from his residence the indorser or drawer should be served at his residence without attempt-

³⁶ See note 22, § 281, *post*.

³⁷ See note 22, § 281, *post*.

³⁸ See note 22, § 281, *post*.

³⁹ See note 22, § 281, *post*.

¹ McCrummen v. McCrummen, 5 Mart. (N. S.) 159; Walker v. Stetson, 14 Ohio St. 89; Goodwin v. McCoy, 13 Ala. 271; Wooley v. Lyon, 117 Ill. 244; McMurtrie v. Jones, 3 Wash. C. C. 206; Gist v. Lybrand, 3 Ohio, 307; Isbell v. Lewis, 98 Ala. 550; Burkhardt v. Fourth Nat. Bank, 6 Wkly. Law Bul. 138. But see Runyon v. Montfort, 44 N. C. 371.

² See Murray v. Ormes, 3 MacA. 60.

³ McMurtrie v. Jones, 3 Wash. C. C. 206.

⁴ Burkhardt v. Fourth Nat. Bank, 6 Wkly. Law Bul. 138.

⁵ See Bradley v. Davis, 26 Me. 45; Bank of U. S. v. Hatch, 6 Pet. 250. See Rives v. Parmley, 18 Ala. 256.

⁶ Hobbs v. Straine, 149 Mass. 212; State Bank v. Hennen, 4 Mart. (N. S.) 227.

⁷ Lawrence v. Ralston, 3 Bibb, 102; Curtis v. State Bank, 6 Blackf. 312.

ing to ascertain his whereabouts or waiting for his return.⁸ Even though the house be closed during the absence, the notice may be left with a neighbor with directions to deliver.⁹ But it has been held that where an indorser with his family had left his home, which was kept open and occupied by servants, a notice left at the house was not a good service, if the holder by reasonable diligence could have ascertained that the family were absent.¹⁰ The family had gone south within the rebel lines, and there was no showing whatever that they had an established residence or even a nomadic stopping place elsewhere. The case is undoubtedly a wretchedly erroneous decision. In another case the indorser was away from his residence and within the Confederate lines, and a notice by mail was sent to his place of residence, and the notice was held bad.¹¹ In yet another case the indorser was away from his residence and serving in the rebel army, and a notice left at his residence was held bad.¹² On the principle of these decisions, if a man in the far west should absent himself from his residence and go out upon the range for the purpose of stealing cattle, a notice left at his house or mailed to his postoffice would be badly served, a conclusion absurd enough; yet the two cases do not differ except in the species of illegality that actuated the person leaving home. It is exceedingly difficult to avoid the impression of a political prejudice in these rulings of the court. The court seems to have thought that the interruption of communication by war cut some figure, but that is material

⁸ See *Walker v. Stetson*, 14 Ohio St. 89.

⁹ *Williams v. Bank of U. S.*, 2 Pet. 96.

¹⁰ *Alexandria Sav. Inst. v. McVeigh*, 84 Va. 41.

¹¹ *Gilroy v. Brinkley*, 12 Heisk. 392. The court in this case does not see that the whole point is whether the residence of the indorser had been established anywhere else, and

whether that fact was known to the server. The opinion is accurately described by the word "bête."

¹² *McVeigh v. Allen*, 29 Gratt. 588. See the same case 26 Gratt. 785, where the opinion by Moncure, J., who seemed to be much more of a lawyer than the judge who delivered the controlling opinion, correctly states the law. It is pitiful to read the opinion of Anderson, J.

only when the residences of the party serving and the one to be served are separated by the theatre of war. Here the only question to determine was that of residence or no residence at the place of serving. But even conceding that the indorser had obtained a residence in Richmond, nevertheless he kept his house at Alexandria, and there was nothing to show that the server had not exercised full diligence. It is difficult to speak of such opinions with anything but impatient distaste. Judges who make them simply certify to their own either incompetence or unfitness.

The cases of members of legislatures, while on service with their legislative bodies, may be considered sometimes as cases of change of residence, sometimes of temporary absence from home. If the legislator keeps a residence at his home, notice may be served there, though the proprietor is in Washington serving in the legislature.¹³ A notice left at the Washington lodgings after congress had adjourned, where the congressman had returned, as was his habit, after adjournment to his home in Virginia, a home which he kept open all the time, was held to be not properly served.¹⁴ Again, it has been held that a notice left at the postoffice of the House or Senate for a member of either body was not good without showing an actual reception of it;¹⁵ but a notice left at the legislator's room in the hotel where he stopped was properly served.¹⁶ If the congressman retains a residence in his state it is wrong to send the notice to Washington by mail,¹⁷ although afterwards the court held it a proper proceeding where the member had no residence or

¹³ *Marr v. Johnson*, 9 Yerg. 1. There was no right to make mail service. Compare with *Gilroy v. Brinkley*, 12 Heisk. 392. The two cases are irreconcilable.

¹⁴ *Bayley v. Chubb*, 16 Gratt. 284. The learned reporter informs us that in this case Lee, J., did not "set." Compare *McVeigh v. Allen*, 29 Gratt. 588.

¹⁵ *Hill v. Norvel*, 3 McLean, 583.

¹⁶ *Graham v. Sangston*, 1 Md. 59. The court was compelled to make the presumption that the room was the member's residence.

¹⁷ *Walker v. Tunstall*, 3 How. (Miss.) 259. This case amounts to saying that the domicile and not the residence is the place to serve notice.

agent in the state.¹⁸ Another court held that when a member of congress was in Washington, a notice sent to him there was good.¹⁹ But in a case where Daniel Webster, with his easy facility in matters of business, had indorsed a note, he was served with notice by mail to Washington while he was there attending a session of the senate. He had an agent in Boston who attended to his business (at Webster's place of business in Boston) in his absence, but the holder did not know this, although it is a fair inference that he could have found it out if he had tried to do so; yet the notice was held to have been properly served.²⁰ From the foregoing decisions it is difficult to say what is the rule. Certainly, a legislator's absence from his place of residence is but temporary; he retains his legal residence there. Most of the members have their businesses and places of business at their homes. They may achieve a somewhat precarious residence while battenning in some Washington boarding house, or may even attain to the dignity of a rented house. Under such circumstances a service at their homes ought to be held good, yet it is no less certain that a service by mail to Washington during the session, or a personal service, actual or constructive, at Washington during the session ought to be good. Perhaps the riddle is best solved by saying, under the circumstances above stated, that the member has his place of business at his home and his residence during the session in Washington, and a service at either place is good. Fortunately, the place of sojourn of congressmen is so thoroughly exploited by our indefatigable press that a service, either personal or by mail, is always possible, unless the member should be absent upon one of those admirable

¹⁸ *Tunstall v. Walker*, 2 Smedes & M. 638. The record in this case shows that a man may be secretary of the treasury and have little sense of business honor.

¹⁹ *Commercial Bank v. Chambers*, 14 Mo. App. 152.

²⁰ *Chouteau v. Webster*, 6 Met. 1. The cases in this section should be

compared with the cases in the last section. The courts have been unable to agree upon any reasonably fixed rule, and the same court has been unable to agree with itself. The question is complicated by the distinctions that are sought to be made and are made between actual residence and domicile.

junketing expeditions which so justly permit a little relaxation from arduous duties, and which are so thoroughly designed to reflect credit upon our representative institutions.

§ 281. **Change of residence.**—Some of the instances mentioned in the former section may be considered as cases where the indorser or drawer has changed his residence, and no further reference needs be made to them here. It is needless to say at this point that if the maker of the note or the drawee or acceptor of the bill of exchange has changed his residence so that for any reason a demand of payment cannot be made after due diligence, or is excused, notice to the drawer or indorser is not thereby excused, but notice should be given just as well as where a demand is made and payment actually refused.¹ The instances which are now being considered are those where the indorser or the drawer has changed his residence so as to interfere with the service of notice. This change of residence may be known or not known to the holder. If known to the holder it may not be known to the agent serving the notices. Whether the holder will be chargeable with negligence for not giving the agent all his knowledge as to the indorser's residence has been already discussed.² Considering now the person serving the notice, whether it be the holder or his agent, if the person serving knows of a change of residence on the part of the indorser or drawer and knows the new residence, notice must be sent to the new place of residence,³ wherever it may be, except if the removal be into another state;⁴ and this rule is not changed by the place where the instrument is dated⁵ nor where it is made payable.⁶ If the change of residence is known, and it is said if it be not known but

¹ Taylor v. Snyder, 3 Denio, 145; Gray, 503; Hilborn v. Artus, 4 Ill. Michaud v. Legarde, 4 Minn. 43; 344.

Williams v. Matthews, 3 Cow. 252; ⁵ Taylor v. Snyder, 3 Denio, 145; Haber v. Brown, 101 Cal. 445. Lowery v. Scott, 24 Wend. 358.

² See § 277, ante, note 24.

⁶ See cases cited in preceding

³ Taylor v. Snyder, 3 Denio, 145. notes, and Baker v. Clark, 20 Me.

⁴ See Grafton Bank v. Cox, 13 156.

ought to have been known in the exercise of due diligence,⁷ the person serving the notice proceeds to serve as if the person to be charged had resided at his new residence when the bill was drawn or note was indorsed.⁸ But in case the fact of the change of residence is known, but the new residence is not known to the person serving, the whole matter of proper service is resolved simply into a question of due diligence to ascertain the new address, a matter which will be examined in the next section. But even if the change of apparent address be known, there are instances such as those mentioned in the former section, where the change may be treated merely as an absence from the residence.⁹ An example of such a case is found where the indorser had left the house in Washington where he lived at the time he indorsed and had removed to New York, where he was living with his wife, although his residence in Washington remained in the occupancy of his daughter and his former servants; the notice served at the house in Washington was considered good.¹⁰ The facts in this case were not plain, but it seems reasonably certain that the server must have been able to ascertain and did ascertain the change of residence on the part of the indorser; therefore the above statement is correct.

Where the change of residence is not known certain presumptions may be indulged, subject to the limitation as to the manner of service suggested below, and those presumptions are that the maker of the note lives where the note is dated,¹¹ and the drawer of the bill, provided diligent inquiry gives no information, lives where the bill is drawn;¹² but this same presumption does not necessarily exist in the case of an

⁷ *Baker v. Clark*, 20 Me. 156; *Harris v. Memphis Bank*, 4 Humph. 519.

⁸ See notes 3 and 4, *supra*.

⁹ See preceding section.

¹⁰ *Murray v. Armes*, 3 MacA. 60.

¹¹ *White v. Wilkinson*, 10 La. Ann. 394; *Smith v. Philbrick*, 10 Gray, 252. But see *Galpin v. Hard*, 3 McCord, 394; *Mason v. Pritchard*, 9

Heisk. 793. If the address is on the note the place of dating is secondary. *Nicholson v. Barnes*, 11 Neb. 452.

¹² *Robinson v. Hamilton*, 4 Stew. & P. 91; *Tyson v. Oliver*, 43 Ala. 455; *Lowery v. Scott*, 24 Wend. 358; *Hill v. Varrel*, 3 Me. 233; *Barnwell v. Mitchell*, 3 Conn. 101.

indorser,¹³ yet it has been upheld. Therefore in serving by mail, in the absence of other knowledge, the notice to the drawer¹⁴ or the indorser,¹⁵ by some authority (certainly as to the indorser or drawer after diligent inquiry),¹⁶ may be directed to the place of dating. Again, the server has the right to assume in the absence of other knowledge that the drawer and the indorser have continued to reside or to have a place of business where the residence or place of business was at the time of the indorsement or drawing of the bill.¹⁷ It is beyond doubt that if the server has notice of the change of residence, he must direct his notice to the new residence if he knows it,¹⁸ and if he does not his duty is confined to exercising due diligence as will appear in the next section. This question of presumption is not as likely to arise where the service being made is personal. If the service is being made at the former residence, if it is found closed and unoccupied, diligence will require further inquiry. If it is occupied, inquiry will necessarily be made for the person to be charged, and the fact of non-residence at the place will be ascertained, or the reason of absence. But a person may change his residence and still maintain a place of business at his former place. Service by mail to the place of business so retained will necessarily be good, as will personal service at that place under the rules hereinbefore stated,¹⁹ wherever the residence may be. Or if the sign is retained at the place of business the server may act upon the apparent fact of

¹³ Runyon v. Montfort, 44 N. C. 371.

¹⁴ Robinson v. Hamilton, 4 Stew. & P. 91, *semble*.

¹⁵ Page v. Prentice, 5 B. Mon. 7, *semble*.

¹⁶ Dickens v. Beal, 10 Pet. 574. See cases in note 12 as to drawer. Runyon v. Montfort, 44 N. C. 371, and Carrol v. Upton, 3 N. Y. 272, as to indorser.

¹⁷ Ward v. Perrin, 54 Barb. 89; Menzies v. Farmers' Bank, 3 Ky. Law R. 822; Union Bank v. Govan, 10 Smedes & M. 333; Rowland v.

Howe, 48 Conn. 432; Bank of Utica v. Phillips, 3 Wend. 408; Importers' Nat. Bank v. Shaw, 144 Mass. 421.

¹⁸ Wilcox v. Mitchell, 4 How. (Miss.) 272. If he does not know, must inquire with due diligence. Barker v. Clark, 20 Me. 156. It is needless to say that personal notice may be given to the indorser at the place of demand whether it is his residence or not. Austin v. Latham, 19 La. 88.

¹⁹ See preceding section.

occupation,²⁰ unless he has other knowledge. And the service upon an agent retained in the place of former residence will be equally good if he have the requisite authority.²¹ The above rules are of importance only when the person to be charged with notice has not actually received the notice in due time. If he does receive in proper time the notice sent, however wrongly it may have been directed, and however irregular the means, he will none the less be charged with notice.²²

§ 282. Diligence to find address.—The question of notice to an indorser is never one of the actual receipt of notice, except where the server has failed to exercise due diligence in the manner of service.¹ Assuming the server not to know the present address or residence or place of business of the person to be served, and eliminating the cases where the place of service has been designated,² a duty devolves upon the server to ascertain the address if he can do so by the exercise of due diligence.³ The server may never have known any address, or he may not know the address on account of a change of residence, of which he has information.⁴ It perhaps needs not be stated that if the server, knowing the right address, serves at a wrong one, the notice is not good;⁵ or if, having information, he does not act upon it to the best of his knowledge, the notice will not be sufficient.⁶ The

²⁰ *Beier v. Strauss*, 54 Md. 278.

²¹ *Bliss v. Nichols*, 94 Mass. 443.
See *Blakeley v. Grant*, 6 Mass. 386.

²² *Cadillon v. Rodriguez*, 25 La. Ann. 79; *Thomas v. Marsh*, 2 La. Ann. 353; *First Nat. Bank v. Wood*, 51 Vt. 471; *Moreland v. Citizens' Sav. Bank*, 97 Ky. 211; *Matthewson v. Stafford Bank*, 45 N. H. 104; *Bank of U. S. v. Corcoran*, 2 Pet. 121.

¹ See cases in note 22 to last section, and *Hitner v. Finney*, 1 Wkly. Notes Cas. 50. The question of due diligence is to be determined by

what was done, not by information received after the fact. *Brighton Market Bank v. Philbrick*, 40 N. H. 506.

² See § 235, *ante*.

³ See the cases in note 1, *supra*, and note 18 to last section.

⁴ This requires due diligence in inquiring.

⁵ *Bacon v. Hanna*, 137 N. Y. 379.

⁶ *Randall v. Smith*, 34 Barb. 452. And see *Bacon v. Hanna*, *supra*, where the address was upon an old note, of which the particular note was a renewal.

test of reasonable diligence has been defined to be the amount of care a reasonably prudent man of business would exercise in regard to matters upon which he desired to act with correct information.⁷ Whether or not these phrases define anything at all more than the fact that the standard of the law is a reasonably prudent man it is difficult to say, but they have at least received the full meed of judicial approbation: From the decisions a number of rules for the determination of correct diligence can be derived, but the application of them will vary with varying circumstances. For after all, due diligence is an ultimate fact to be gathered from the probative facts in evidence: If those facts are in dispute, the question of due diligence, in this case as in all others, is one for the jury under cautionary instructions from the court. If the facts are such that reasonable men might differ in regard to the conclusion from them of due diligence, the question is none the less a matter for the jury. If the facts, however, are undisputed and the matter is one about which reasonable men could not differ, the question is one for the court.

Assuming now that the server of notice has inquired of the owner, and the holder of the paper has no knowledge as to the place of residence of the indorser or drawer, he must govern himself by making proper inquiries. He cannot assume that the indorser has retained a residence which he had some considerable time prior to the date of indorsing;⁸ although, as we have said, he may assume that the residence at the time of indorsement or drawing has been retained.⁹ If he has reasonable ground to think that he knows the residence or has ascertained it, he exercises due diligence in acting upon his belief.¹⁰ Subject to this presumption he should examine the paper itself. If it be payable at a particular place, as a bank, inquiries must be made at that place.¹¹ He may act

⁷ *Palmer v. Whitney*, 21 Ind. 58. *Palmer v. Whitney*, 21 Ind. 58;

⁸ *Planters' Bank v. Bradford*, 4 Wood v. Corl, 4 Met. 203.
Humph. 39.

¹¹ *Goodloe v. Godley*, 13 Smedes & M. 233.

⁹ See the preceding section.

¹⁰ *Barr v. Marsh*, 9 Yerg. 253;

upon information received there if it indicates the residence of the person to be charged.¹² If he does not receive sufficient information there he should inquire of the parties to the paper, such as the maker or drawer or other indorsers;¹³ he cannot rest upon the bank's lack of information as to the residence. If it be the drawer he is seeking, however, he may not address him at the place where the bill is drawn without inquiry,¹⁴ according to some authority, but may do so without further inquiry, according to other authority.¹⁵ Where the paper is not payable at a particular place, if it be a note he should inquire of the maker or of the other parties, if he knows the residences of those parties.¹⁶ He is justified in acting upon the information indicating the residence which he receives,¹⁷ even though the information be incorrect; as, for example, where another person had the same name.¹⁸ But information from a casual stranger (this term is used for want of a better), which turns out to be incorrect owing to the identity of names, ought not to have been acted upon.¹⁹ But this seems to be an instance of *ex post facto* wisdom. If information be not received in the preceding manner, inquiry should be made from those who are most likely to know where the person to be charged is,²⁰ and if informa-

¹² *Herbert v. Servin*, 4 N. J. Law, 225; *Hunt v. Nugent*, 10 Smedes & M. 541; *Cabot Bank v. Russell*, 4 Gray, 167.

¹³ *Gilchrist v. Donnell*, 53 Mo. 591. See the language of the court in *Whitridge v. Rider*, 22 Md. 548; but *Goodloe v. Godley*, 13 Smedes & M. 283, says that no further inquiry is necessary.

¹⁴ See the preceding section. And he must make due inquiry as to whether there be a postoffice at the place. *Tyson v. Oliver*, 43 Ala. 455.

¹⁵ See the preceding section.

¹⁶ *Gilchrist v. Donnell*, 53 Mo. 591; *Earnest v. Taylor*, 25 Tex. Sup. 37; *Mitchell v. Young*, 21 La. Ann. 279.

¹⁷ *Harris v. Robinson*, 4 How. 336; *Gawtry v. Doane*, 51 N. Y. 84 (information from the maker); *Eager v. Brown*, 11 La. Ann. 625 (information from the drawee).

¹⁸ *Libby v. Adams*, 32 Barb. 542.

¹⁹ *Lawrence v. Miller*, 16 N. Y. 235. See *Chapman v. Lipscomb*, 1 Johns. 294.

²⁰ *Bartlett v. Isbell*, 31 Conn. 296. This case makes, as applied to the facts, an untenable distinction between a servant and agent. The case is really wrong, because the agent did not inquire of the holder. *Harris v. Robinson*, 4 How. 336. *Garver v. Downie*, 33 Cal. 176.

tion is obtained from such persons it may be acted upon.²¹ If the information received indicates a residence in some other place than where the server lives, he mails the notice accordingly.²² But it would not be safe to follow any other method without inquiry, such as mailing to the indorser directly to the place where the note is dated,²³ or mailing directly to the drawer or indorser at the place where the bill is drawn.²⁴ Nor if the paper is payable at a particular place, can the notice be left there or mailed to that place, without inquiry for the drawer or indorser.²⁵

But the inquiry may designate a district as a county for the residence of the party to be charged without indicating his postoffice address. If the notice is mailed to the county generally, where it has more than one postoffice,²⁶ or to a parish which is in the same condition,²⁷ it will be insufficient. But if diligent inquiry does not develop the postoffice beyond indicating the county, the notice may be mailed to the county seat.²⁸ But a letter should not be directed to any place without knowledge or inquiry as to their being a postoffice at the place.²⁹ If the information derived indicates that the person to be served has a residence in the same place with the server and the place has no free-delivery system, the notice, under the rule, must be personally served; it cannot be served by mail,³⁰ unless by force of a statute.³¹ As soon as the fact appears that the server has mailed a letter containing notice directed to the same place where it is mailed, that particular place having no free-

²¹ *Harris v. Robinson*, 4 How. 336; *Branch Bank v. Pierce*, 3 Ala. 321, and last note.

²² *Brighton Market Bank v. Philbrick*, 40 N. H. 506; *Beals v. Parish*, 24 Barb. 243. The liability having been fixed by due diligence, the right to hold such indorser passes to every subsequent holder of the note, even though that holder was an indorser who had knowledge which the server had not.

²³ See preceding section.

²⁴ See preceding section.

²⁵ *Greves v. Tomlinson*, 19 La. Ann. 90.

²⁶ *Taylor v. Bank of Illinois*, 7 T. B. Mon. 576.

²⁷ *Freeman v. Wikoff*, 16 La. 20.

²⁸ *Whitridge v. Rider*, 22 Md. 548.

²⁹ *Tyson v. Oliver*, 43 Ala. 455.

³⁰ See § 272, *ante*.

³¹ See § 272, *ante*.

delivery system, the burden is thrown upon the server, at once, to show due inquiry before such mailing, and failure to ascertain information.³² But this is subject to the rule that the server may always send the notices to a particular place to be served either personally³³ or by mail,³⁴ where he does not know the address. In making his inquiries to find the residence or place of business of the party to be served, in the same place where the server resides, he cannot act upon the identity of a name in the directory alone.³⁵ He should make other inquiries. He must resort here as well to the people most likely to know the address,³⁶ to the place where it is payable, if it be payable at a particular place,³⁷ to the parties to the paper,³⁸ and to the usual means of public information.³⁹ If he cannot find the residence or place of business, he may leave the notice at the place where the paper is payable.⁴⁰ If he does find the address or place of business and there be no free-delivery system, he must proceed to make personal service as indicated in a preceding section.⁴¹

Where a change of residence has taken place, inquiry should be made in the manner before indicated, to the place where the paper is payable,⁴² to the parties to the paper,⁴³ to those people most likely to know,⁴⁴ and to the usual sources of public information.⁴⁵ But inquiry should be made at the last place of residence as well as the new place of residence, if it is ascertained.⁴⁶ Where the new place of res-

³² See § 272, *ante*.

³³ See § 272, *ante*.

³⁴ See § 272, *ante*.

³⁵ *Bacon v. Hanna*, 137 N. Y. 379; *Greenwich Bank v. De Groodt*, 7 Hun, 210. The directory should be consulted if it is accessible. *Lawrence v. Miller*, 16 N. Y. 231; *Cooley v. Shannon*, 20 La. Ann. 548.

³⁶ See cases in note 20, *supra*.

³⁷ See cases in note 11, *supra*.

³⁸ See cases in note 16, *supra*. *Pierce v. Pender*, 5 Met. 352. Or to

a party's agent. *Barker v. Hall*, 8 Tenn. 183.

³⁹ The cases in the notes just cited indicate these means. See note 35, *supra*.

⁴⁰ He needs not serve notice at all.

⁴¹ See § 272, *ante*.

⁴² See cases in note 11, *supra*.

⁴³ See cases in note 16, *supra*.

⁴⁴ See cases in note 20, *supra*.

⁴⁵ See note 39, *supra*.

⁴⁶ *Hume v. Watt*, 5 Kan. 34. The first head-note to this case ought

idence is in another place than the former, and not in the same place where the server resides, the mail will be used. If the person to be served with notice has moved into another state, notice needs not be given to him;⁴⁷ but if the party to be served has absconded⁴⁸ or has departed without leaving any address⁴⁹ or agent,⁵⁰ notice to him will not be necessary. Since in all cases diligence to find is equal to a good service, it follows that, if afterward information be obtained as to the residence, notice then will not be necessary;⁵¹ but on this point there seems to be a doubt suggested in a certain case which is not authority.⁵² But even if diligence has not been used in any case, the receipt of the notice in due time by the person to be served from some one competent to give it, however irregular the means, renders the lack of diligence immaterial.⁵³ These rules as to service are all of them modified by the right to transmit notices, and to serve them as between successive obligors upon the paper.⁵⁴

§ 283. **Time for service.**—Subject to excuses for no notice at all, and subject to reasons for delay which are adequate, the rule as to the necessity of promptitude in giving notice is strictly held. The parties who may claim this right to prompt notice have been hereinbefore indicated as the indorser of a note,¹ the drawer of a bill,² the indorser of

to be put among the genuine curiosities of the law.

⁴⁷ See § 281, *ante*, note 4.

⁴⁸ *Madderom v. Heath Mfg. Co.*, 35 Ill. App. 588; *Williams v. Bank of U. S.*, 2 Pet. 96.

⁴⁹ *Williams v. Bank of U. S.*, 2 Pet. 96.

⁵⁰ *Williams v. Bank of U. S.*, 2 Pet. 96.

⁵¹ *Lambert v. Ghiselin*, 9 How. 552; *Rowland v. Howe*, 48 Conn. 432.

⁵² *Canonge v. La. St. Bank*, 7 Mart. (N. S.) 583. But see *Blodgett v. Durgin*, 32 Vt. 361.

⁵³ *Witeford v. Burckmeyer*, 1 Gill, 127; *Thomas v. Marsh*, 2 La. Ann. 353; *First Nat. Bank v. Wood*, 51 Vt. 471; *Cadillon v. Rodriguez*, 25 La. Ann. 79; *Matthews v. Strafford Bank*, 45 N. H. 104; *Moreland v. Citizens' Sav. Bank*, 97 Ky. 211; *Freeman v. Wikoff*, 16 La. 20; *Bank of Columbia v. Lawrence*, 1 Pet. 578.

⁵⁴ See §§ 277, 278, *ante*.

¹ See § 239, *ante*.

² See § 235, *ante*, 20.

a bill,³ the drawer of a check only when he has been injured by delay,⁴ the indorser of a check.⁵ This notice must be neither too early nor too late. A notice served before a demand made,⁶ or before a demand could be legally made,⁷ are alike worthless. A notice given on the second day of grace,⁸ unless the third day is Sunday,⁹ is a nullity. The notice can be sent as soon as the demand is made on the third day of grace;¹⁰ but in jurisdictions where the whole of the third day of grace is permitted to the maker or drawee in which to pay,¹¹ a notice cannot be given before the close of business hours on the third day of grace,¹² or, if the paper is payable at a bank, before the close of banking hours on the third day of grace.¹³ But as soon as the demand for acceptance is made and refused,¹⁴ or, if no such demand is made, as soon as a demand for payment is made and refused,¹⁵ the notice must be given. It will be immaterial if a second demand is made and notice of that demand and refusal given.¹⁶ This notice may be given the same day,¹⁷ but it is not necessary that it should be. If the parties live in the same place, notice may be given the next day, if the notice is personal.¹⁸ If the service in the same place is to

³ See § 235, *ante*.

⁴ See § 237, *ante*.

⁵ See § 237, *ante*.

⁶ *Lawrence v. Langley*, 14 N. H. 70.

⁷ *Toothaker v. Cornwall*, 3 Cal. 144; *Etting v. Schuylkill Bank*, 2 Pa. 355; *Thornberg v. Emmons*, 23 W. Va. 325.

⁸ *Etting v. Schuylkill Bank*, *supra*.

⁹ See § 286, *post*.

¹⁰ *Manchester Bank v. Fellows*, 28 N. H. 302; *Bussard v. Levering*, 6 Wheat. 102; *Lyndenberger v. Beall*, 6 Wheat. 104; *Guignon v. Union Trust Co.*, 156 Ill. 135; *King v. Crowell*, 61 Me. 244; *Corp v. McComb*, 1 Johns. Cas. 328; *Garland*

v. West, 9 Baxt. 315; *Draper v. Clemens*, 4 Mo. 52.

¹¹ *Pierce v. Cate*, 12 Cush. 190. For rule in California, see *Toothaker v. Cornwall*, 4 Cal. 28.

¹² See the last note.

¹³ See the last note.

¹⁴ See § 233, *ante*.

¹⁵ See § 233, *ante*.

¹⁶ See § 270, *ante*, note 50.

¹⁷ See cases in note 10, *supra*.

¹⁸ *Pierson v. Duckham*, 3 Litt. 385; *Lockwood v. Crawford*, 18 Conn. 361; *Curry v. Bank of Mobile*, 8 Port. 360; *Remington v. Harrington*, 8 Ohio, 507; *Barker v. Weston*, 10 Iowa, 593 (the usage of bank does not change this rule); *Grand Bank v. Blanchard*, 23 Pick. 306.

be made by mail, by reason of a statute¹⁹ or the existence of a free-delivery system,²⁰ the notice, if mailed the next day after the demand and refusal, should be mailed in time to be delivered on that day,²¹ and, if addressed to a place of business in the same city, it ought, on principle, to be mailed in time to be delivered during business hours of that day.²² The mailing is a substitute for the personal service, but the question of time is determined by the deposit in the mail, without regard to the receipt of the notice. Therefore a rule can be laid down uniformly as to a mail service where the residence is known. But where the residence is unknown, time consumed in diligent inquiry for the residence is always permitted, whether the service is personal or by mail to the same place or another place.²³ Where personal service is had, the question of reasonableness of the time of service is to be determined by the receipt of the notice. The test is whether notice is given within a reasonable time in view of all the circumstances.²⁴ The notice need not be immediate where there is no regular communication,²⁵ yet diligence should be shown to use the earliest means of conveyance where the mails are not regular.²⁶ The holdings upon this question are generally negative and many of them made when means of communication were defective. Thus, a delay of two and a half years to serve a notice at a distance of one hundred and thirty-two miles,²⁷ a delay of four years,²⁸ a delay of two years by one indorser to another,²⁹ a

¹⁹ See § 272, *ante*.

²⁰ See § 272, *ante*.

²¹ *Bell v. Hagerstown Bank*, 7 Gill, 216; *Walters v. Brown*, 15 Md. 285; *Shoemaker v. Mechanics' Bank*, 59 Pa. 79.

²² There seems to be no decision on this point.

²³ *Eagle Bank v. Chapin*, 3 Pick. 180; *Smyth v. Hawthorn*, 3 Rawle, 355. The court is mistaken in its statement of the facts of the case. The notice was one day too late, unless the time was given for inquiry.

²⁴ *Phelps v. Blood*, 2 Root, 518. It is singular to notice how much superior the old style of opinion is to the present method of writing treatises in each case.

²⁵ See cases in succeeding notes.

²⁶ *Spencer v. Sterling*, 10 Mart. (O. S.) 88; *United States v. Barker*, 4 Wash. C. C. 464, 12 Wheat. 559.

²⁷ *Steinmetz v. Curry*, 1 Dall. 234, 270.

²⁸ *Hager v. Boswell*, 4 J. J. Marsh. 61.

²⁹ *Steinmetz v. Curry*, 1 Dall. 234.

delay of twelve months,³⁰ a delay of seven months,³¹ of four and one-half months,³² of four³³ and of two³⁴ months in the same city, a delay of fourteen days,³⁵ of fifteen days,³⁶ of three weeks,³⁷ of nineteen days in the same town,³⁸ of ten days,³⁹ of nine days to serve at a distance of two miles,⁴⁰ nine days on a foreign bill,⁴¹ eight days to serve at a distance of four miles,⁴² a delay of several days,⁴³—was in each instance held unreasonable. Approaching the shorter times, a delay of two days unexplained on a personal service,⁴⁴ of two days without diligence shown,⁴⁵ a notice after three days' delay,⁴⁶ a notice on the second day after maturity,⁴⁷ or after one day's delay,⁴⁸ is too late. Thus the rule can be brought down to the general statement that a delay in serving notice personally or by mail for any longer period than the next day after demand is presumptive negligence and must be explained. The effect of holidays intervening will be noticed a little later on.⁴⁹ But certain delays have been held reasonable. Thus, in the old days when the mails were carried at comparatively long intervals between Europe and America, a delay in waiting for the fast mail was excusable, though ships carrying mails left earlier, but would not reach the port any sooner than the fast mail.⁵⁰ One court, at an

³⁰ Kilpatrick v. Heaton, 3 Brev. 92.

³¹ Lewis v. Brewster, 2 McLean, 21 (a guarantor).

³² Patillo v. Alexander, 96 Ga. 60.

³³ Yancey v. Littlejohn, 9 N. C. 525.

³⁴ London v. Howard, 2 Hayw. (N. C.) 332.

³⁵ Hubbard v. Troy, 2 Ired. 134.

³⁶ Brown v. Turner, 11 Ala. 752.

³⁷ Alshausen v. Lewis, 1 Biss. 419.

³⁸ Green v. Darling, 15 Me. 141.

³⁹ Deininger v. Miller, 40 N. Y. Supp. 195 (notice to an executor).

⁴⁰ Morris v. Gardner, 1 Cranch, C. C. 213.

⁴¹ United States v. Barker, Fed. Cas. 14,519.

⁴² Hussey v. Freeman, 10 Mass. 84.

⁴³ Bank of Orleans v. Whittemore, 12 Gray, 469.

⁴⁴ Howland v. Adrian, 30 N. J. Law, 41.

⁴⁵ Union Bank v. Fonteneau, 12 Rob. (La.) 120.

⁴⁶ Clark v. Nat. Metrop. Bank, 2 MacA. 249.

⁴⁷ Hert v. Vincent, 29 N. Y. Supp. 61.

⁴⁸ East River Bank v. Gedney, 4 E. D. Smith, 582; Hert v. Vincent, 29 N. Y. Supp. 61. And see Farmers' Bank v. Butler, 3 Litt. 498.

⁴⁹ See § 286, *post*.

⁵⁰ Stainback v. Bank of Virginia, 11 Grat. 260.

early day, achieved the unique distinction of saying that in case of dishonor notice must be sent by the first ship sailing for any port in the United States.⁵¹ A delay, in the year 1816, of six or seven days in starting a letter from New York to New Orleans was considered reasonable,⁵² or a delay of six or seven days when that was the due course of mail,⁵³ or a delay of one day in serving twenty miles.⁵⁴ Delays caused by miscarriages in the mail⁵⁵ are excusable. The delays caused by death or war or pestilence will be later examined.⁵⁶

§ 284. What mail of the day.—As we have seen, where notice is served by mail in the same place where it is given, the letter should be deposited in the mail, if deposited the next day after demand, in time to be delivered on that day.¹ There is another rule applicable to posting on the next day after demand which has its reason in the same considerations of active diligence which support the rule just stated. It is that notice mailed upon the next day after dishonor must be by the first mail on that day.² But this rule is subject to limitations: first, that there be a mail on that day; if there be none, the server may wait until the next mail day;³ second, the mail must be made up at a reasonable hour on that day. If the mail of that day closed the night before, it is a mail of the preceding day.⁴ What

⁵¹ *Fleming v. McClure*, 1 Brev. 428. There was no evidence to show an earlier sailing. The jury were left to presume it without proof.

⁵² *Pinder v. Nathan*, 4 Mart. (O. S.) 346.

⁵³ *Sharpe v. Drew*, 9 Ind. 281.

⁵⁴ *Freeman v. Wikoff*, 16 La. 20.

⁵⁵ See § 273, note 1, and *Newbold v. Boralf*, 155 Pa. 227.

⁵⁶ See §§ 287, 291, *post*.

¹ See note 21 to the preceding section.

² *Burgess v. Vreeland*, 24 N.J. Law, 71; *Dodge v. Bank of Kentucky*, 2

A. K. Marsh. 610; *U. S. Bank v. Merle*, 2 Rob. (La.) 117; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528. And see cases in the next two notes. See also *Smith v. Poillon*, 87 N. Y. 590; *Eagle Bank v. Chapin*, 3 Pick. 180; *Commercial Bank v. Union Bank*, 19 Barb. 391.

³ *Lawson v. Farmers' Bank*, 1 Ohio St. 206. But he must send by the first mail thereafter. *Townsley v. Springer*, 1 La. 122.

⁴ *Wemple v. Dangerfield*, 2 Smedes & M. 445.

is a reasonable hour should be decided by the business hours of the place, allowing reasonable time for the preparation of the notice after the beginning of business hours.⁵ Thus, 8 o'clock in the morning is an unreasonable hour in New York,⁶ but an Ohio court contends that 9 o'clock A. M. is a reasonable hour for a Pennsylvania man at the depressing city of Pittsburg.⁷ But 2 o'clock A. M. and 5 o'clock A. M. are unreasonable for mailing.⁸ In Mississippi a mail at sunrise is too early,⁹ but one at 9 o'clock in the morning is a perfectly reasonable hour.¹⁰ At just what barbarous hour business begins in Mississippi cannot be said, but it lies somewhere between sunrise and 9 o'clock in the morning. In Louisiana 7 o'clock in the morning is presumed to be early enough.¹¹ Subject to the foregoing considerations as to the hour of the mail's leaving, and subject to the rule as to the first mail, the notice if mailed on the succeeding day must be mailed in time to be put into the mail of that day.¹² The better rule is that the notice need not be sent by the first mail on the next day after maturity if a reasonable excuse exists for not doing so, or if there be more than one mail on that day,¹³ and a special indulgence of one day was given to the secretary of the treasury owing to the necessities of

⁵ *Sussex Bank v. Baldwin*, 17 N. J. Law, 487; *Marks v. Boone*, 24 Fla. 177; *Farmers' Bank v. Duvall*, 7 Gill & J. 78; *Chick v. Pillsbury*, 24 Me. 458.

⁶ *Howard v. Ives*, 1 Hill, 263.

⁷ *Lawson v. Farmers' Bank*, 1 Ohio St. 206. The Pennsylvania court considers 7 A. M. a reasonable hour! *Stephenson v. Dickson*, 24 Pa. 148.

⁸ *West v. Brown*, 6 Ohio St. 542; *Stephenson v. Dickson*, 24 Pa. 148.

⁹ *Deminds v. Kirkman*, 1 Smedes & M. 644. The case carefully conceals the time of year.

¹⁰ *Downs v. Planters' Bank*, 1 Smedes & M. 261. It was held that

a mailing at 9 o'clock A. M. was insufficient unless it appeared that there was no earlier mail.

¹¹ *Commercial Bank v. King*, 3 Rob. (La.) 243. Notice put into the mail at 7 o'clock A. M. will be presumed to be in time for the mail of that day, but notice put in at 9 A. M. will not be so presumed. *Beckwith v. Smith*, 22 Me. 125.

¹² *Lenox v. Roberts*, 2 Wheat. 373; *Goodman v. Norton*, 17 Me. 381; *Beckwith v. Smith*, 22 Me. 125; *Manchester Bank v. White*, 30 N. H. 456; *Bank of Alexandria v. Swan*, 9 Pet. 33; *Moore v. Burr*, 14 Ark. 230.

¹³ *Smith v. Poillon*, 87 N. Y. 590; *Whitwell v. Johnson*, 17 Mass. 454.

public business.¹⁴ If the server sends notices to an agent to mail, the agent must exercise due diligence, and his delay of one day has been considered unreasonable,¹⁵ as well as his mailing of the notice to be delivered on the next day where he could have delivered on the same day.¹⁶ The choosing of a needlessly circuitous route is not an excuse for the delay resulting therefrom.¹⁷

§ 285. Time for successive obligors.—As we have seen, the notice may come through successive holders or indorsers,¹ and each indorser has one day in which to forward notice after service has been received by him.² The rule of the earliest practicable mail upon the next day is applied to this method of service.³ The indorser notified must send notice of the first notice he receives to the prior indorser, however remote the party may be.⁴ He cannot wait until he receives a notice passing through successive parties after the one who has given him notice.⁵ But notice need not be, as one court mistakenly supposed, after the receipt of actual knowledge.⁶ The rule that whichever party to the paper is selected to be noticed directly from the holder, notice from the holder must be given to him as of the next day after dishonor, without

¹⁴ *United States v. Barker*, 4 Wash. C. C. 464, 12 Wheat. 559.

¹⁵ *United States v. Barker*, *supra*.

¹⁶ *Cassidy v. Kreamer*, 13 Atl. R. 744 (Pa.); *Shelburne Falls Bank v. Townsley*, 102 Mass. 177.

¹⁷ *West River Bank v. Taylor*, 7 Bosw. 466, *semble*.

¹ See §§ 276, 277, 278, *ante*.

² *State Bank v. Ayres*, 7 N. J. Law, 131; *Smith v. Poillon*, 87 N. Y. 590; *Carter v. Burley*, 9 N. H. 558; *Allen v. Avery*, 47 Me. 287; *Lawson v. Farmers' Bank*, 1 Ohio St. 206; *Davis v. Hanley*, 12 Ark. 645; *Grand Gulf Co. v. Barnes*, 12 Rob. (La.) 127. It was held in *New Orleans Co. v. Bieu*, 9 Rob. (La.) 110, that the notice must be sent within

one day from the time that notice was received in fact. But the indorser can await notice in the regular way. *West River Bank v. Taylor*, 7 Bosw. 466, 34 N. Y. 128.

³ Earliest mail on next day. *Haskell v. Boardman*, 90 Mass. 38; *Mitchell v. Cross*, 2 R. I. 437; *American Life Ins. Co. v. Emerson*, 4 Smedes & M. 177; *Manchester Bank v. Fellows*, 28 N. H. 302. Mail on the same day to same postoffice. *Shelburne Falls Bank v. Townsley*, 102 Mass. 177.

⁴ *Carter v. Burley*, 9 N. H. 558.

⁵ See the last note.

⁶ See note 2, *supra*, the case of *New Orleans Co. v. Bieu*, 9 Rob. (La.) 110.

waiting and claiming the time that would have been made possible if the notice had been sent to him through the parties subsequent to him upon the paper,⁷ applies to indorsers giving notice to other indorsers after notice to them of dishonor.⁸ When notice is sent from the holder or server at another place to an indorser to serve upon a person in the same place as the indorser, that indorser may serve by mail,⁹ although some authority disputes this,¹⁰ and the rule as to the next day for service ought to apply to notice sent to an agent to serve;¹¹ but there is abundant authority for saying that he must act upon the same day that he receives the notice to serve.¹² The rule applies conversely, and there is no doubt that the holder receiving notices from his agent has until the next day in which to serve.¹³ The persons who can give this notice must be, as we have seen, parties to the paper or their agents,¹⁴ and a transferrer of the paper without indorsement.¹⁵ But one who is merely interested in the paper cannot be entitled to this privilege,¹⁶ except as an agent for some actual party; nor can indorsers whose indorsements have been erased,¹⁷ it seems, according to a palpably erroneous decision.

§ 286. Time of service as affected by holidays and Sundays.—Where the day upon which notice should have been

⁷ See § 277, *ante*, and *City Nat. Bank v. Clinton Co. Nat. Bank*, 49 Ohio St. 351; *West River Bank v. Taylor*, 34 N. Y. 128.

⁸ *Etting v. Schuylkill Bank*, 2 Pa. 355; *Simpson v. Turney*, 5 Humph. 419.

⁹ *Shelburne Falls Bank v. Townsley*, 102 Mass. 177; *Warren v. Gilman*, 17 Me. 360.

¹⁰ See § 272, *ante*, note 19.

¹¹ See § 272, *ante*, note 19, and note 16, *infra*.

¹² See § 285, *ante*, notes 15 and 16, and note 16, *infra*.

¹³ *Haskell v. Boardman*, 90 Mass. 38.

¹⁴ See § 278, *ante*.

¹⁵ See § 278, *ante*.

¹⁶ *Flack v. Green*, 3 Gill & J. 474; *Barker v. Whitney*, 18 La. 575. But the real owners who have indorsed the paper for collateral security may give notice. *Cowperthwaite v. Sheffield*, 1 Sandf. 416.

¹⁷ *First Nat. Bank v. Farneman*, 93 Iowa, 161. But it is difficult to conceive of a more erroneous case. The indorsements were canceled after transmission of the notices. That fact was therefore immaterial. They existed when the notices were transmitted.

given is a holiday, assuming that day to be the day of demand and refusal, if that day had not fallen upon Sunday or a holiday, there is no question but that a notice on the following day would be a good notice.¹ Thus, where the third day of grace falls upon Sunday, notice may be given upon Monday.² But it is also true that notice may be given upon Saturday, the day of demand,³ and suit may be begun upon that day.⁴ But if the third day of grace falls upon Saturday, the question is a different one. The Supreme Court of the United States, in one of those Homeric slumbers in which it has occasionally indulged, seems to hold that if the third day of grace were Saturday, and by custom demand was permissible on Monday, notice upon Monday was too late.⁵ But all the authority and all the reason of the matter is that, if Sunday follow the day of demand, notice may be given on Monday.⁶ This rule should be that the intervening holiday is simply eliminated and notice cannot be given thereon.⁷ Holidays under this rule may exist by custom,⁸ if the indorser or other party to be charged had actual or constructive knowledge of the fact.⁹ The suspension of business during

¹ *Burckmeyer v. Whiteford*, 6 Gill, 9; *Colms v. Bank of Tennessee*, 4 Baxt. 422; *Barlow v. Planters' Bank*, 7 How. (Miss.) 129; *Irwin v. Brown*, 2 Cranch, C. C. 314.

² See the cases in the last note.

³ *Bussard v. Levering*, 6 Wheat. 102. But a note was due July 1st, last day of grace July 4th, which was not a holiday, but was so observed; it was held that July 4th was the day for notice and July 3d was premature. See *Lewis v. Burr*, 2 Caines' Cas. 195.

⁴ *Mandeville v. Rumney*, 3 Cranch, C. C. 424.

⁵ *Adams v. Otterback*, 15 How. 539. If the demand was good the notice ought to be good. The above is what the decision says. But the

demand was not in time and the question of notice was immaterial.

⁶ *Crawford v. Milligan*, 2 Cranch, C. C. 226; *Canonge v. Cauchoix*, 11 Mart. (O. S.) 452; *Seventh Ward Bank v. Hanrick*, 2 Story, 416; *Williams v. Matthews*, 3 Cow. 252; *Howard v. Ives*, 1 Hill, 263; *Hallowell v. Curry*, 41 Pa. 322. *Contra*, if mail on Saturday would reach indorser on Saturday, mailing on Monday is too late. *King v. Foyles*, 2 Cranch, C. C. 303.

⁷ *Rheim v. Carlisle Deposit Bank*, 76 Pa. 132. The English authority is *contra*, and so is *Deblieux v. Bullard*, 1 Rob. (La.) 66. Notice may be given on Sunday, but indorser need not act until Monday.

⁸ See § 256, *ante*.

⁹ See § 256, *ante*.

the Christmas season excused notice,¹⁰ but it was also excused because there were no mails.

§ 287. **Service as affected by death or illness.**—The death of the person to be served may affect the place of service, the manner of service or the time thereof. The death of the holder can only affect the time of service or the person by whom the notice is served. The notice, in case of the holder's death, should be given by the personal representative.¹ Any delay in noticing that is reasonable, which is caused by the holder's death, is excusable.² In case the indorser or other person to be served with notice is dead, the person upon whom to serve the notice is the personal representative of the deceased.³ Service upon any one of the personal representatives is good.⁴ A notice left at the temporary boarding place of the administrator is good if he received it, and ought to be good if he did not receive it, provided it was left with any suitable person therein in his absence with directions to deliver;⁵ a notice addressed to the deceased but served on the personal representative,⁶ and a notice addressed to the estate of the deceased, are equally good if received,⁷ and a notice addressed by mail to "Personal Representative" of deceased, naming the deceased, is good whether it be received or not.⁸ The holder here threw upon the postoffice the *onus* of a search and proper delivery, and the court presumed that the postoffice properly attended to the matter. It would be consistent with the proven facts that the postoffice authorities paid no attention

¹⁰ *Martin v. Ingersoll*, 8 Pick. 1.

¹ He succeeds to the personalty.

² *White v. Stoddard*, 11 Gray, 258.

³ *Bank of Columbia v. King*, 2 Cranch, C. C. 570; *Cayuga Co. Bank v. Bennett*, 5 Hill, 236; *Oriental Bank v. Blake*, 22 Pick. 206; *Merchants' Bank v. Birch*, 17 Johns. 25; *Bird v. Doyal*, 20 La. Ann. 541.

⁴ *Carolina Nat. Bank v. Wallace*, 13 S. C. 347; *Beals v. Peck*, 12 Barb. 245.

⁵ *Matthewson v. Strafford Bank*, 45 N. H. 104.

⁶ *Beals v. Peck*, 12 Barb. 245; *Maspero v. Pedisclaux*, 22 La. Ann. 227.

⁷ *Jefferson v. Darling*, 91 Hun, 236.

⁸ *Pillow v. Hardeman*, 3 Humph. 538. *Smalley v. Wright*, 40 N. J. Law, 471, seems to be *contra*.

to the letter. The executor named in the will, though not approved by the court, is the personal representative upon whom to serve;⁹ but the same is not true in the case of an executor who renounced, whereupon a special administrator (though it would seem he should have been administrator *cum testamento annexo*) was appointed, if the holder could have known the fact of such substitution by reasonable diligence.¹⁰ If there be a personal representative he should be served if the holder knows of the death. Service upon the son of deceased at the deceased's place of business was held insufficient where the personal representative had a place of business of his own.¹¹ If the holder is ignorant of the death, a service by letter addressed to the deceased is sufficient.¹² But if the holder has notice of the fact of death, he must exercise due diligence by consulting the records, if in the same place, or by proper inquiries as to the records and from other sources of information.¹³ If after such due diligence no personal representative is found, service at the deceased's residence, and the rule is the same if no personal representative exists;¹⁴ or the mailing of notice addressed to the deceased indorser at his late residence, where the residence is such that service by mail is permitted, will hold the estate of the indorser.¹⁵ If the maker of the note is the indorser's personal representative, notice to him is still necessary;¹⁶ but even if the maker is one of several executors, he may be

⁹ Shoenberger v. Lancaster Sav. Inst. 28 Pa. 459; Drexler v. McGlynn, 99 Cal. 143.

¹⁰ Goodnow v. Warren, 122 Mass. 79.

¹¹ Bank of Columbia v. King, 2 Cranch, C. C. 570.

¹² Linderman v. Guldin, 34 Pa. 54; Planters' Bank v. White, 2 Humph. 112.

¹³ Massachusetts Bank v. Oliver, 10 Cush. 557; Bank of Louisiana v. Smith, 4 Rob. (La.) 276; Dodson v. Taylor, 56 N. J. Law, 11.

¹⁴ Weaver v. Penn, 27 La. Ann.

129; Mathewson v. Strafford Bank, 45 N. H. 104.

¹⁵ Barnes v. Reynolds, 4 How. (Miss.) 114; Mathewson v. Strafford Bank, 45 N. H. 104; Merchants' Bank v. Birch, 17 Johns. 25; Stewart v. Eden, 2 Caines, 121; Massachusetts Bank v. Oliver, 10 Cush. 567; Dodson v. Taylor, 56 N. J. Law, 11. If there be no administrator notice mailed to such non-existent potentiality seems to be good. Boyd v. City Sav. Bank, 15 Grat. 501.

¹⁶ Alton v. Robinson, 2 Humph. 341.

singly served with notice so as to bind all the executors.¹⁷ If there be no personal representative there is no need of applying for the appointment of one in order to serve notice upon him.¹⁸ The service upon the deceased in the latter case should be at his residence at the time of his decease, or upon his family or widow.¹⁹ A notice addressed to the place of residence of the deceased, where his family yet lived, addressed to "Legal Representative" of the dead indorser, was held sufficient, though there was no personal representative.²⁰ The agency to receive notice expires with the death of the principal, as in the case of all other agents who do not attain to the dignity of donees of a power coupled with an interest, and service cannot be made upon him after the death.²¹ If the personal representative, however, has been discharged, notice should be served upon the heirs.²² Upon the effect of illness the rules stated in a former section²³ should be consulted, since the same excuses ought to apply to notice, being served personally.

§ 288. Customs and usages as to notice.—The customs and usages of a bank where a note is made payable, even though it may be made payable there by parol agreement,

¹⁷ *Lewis v. Bakewell*, 6 La. Ann. 359.

¹⁸ *Weaver v. Penn*, 27 La. Ann. 129.

¹⁹ See *Weaver v. Penn*, 27 La. Ann. 129, and cases as to demand, § 257, *ante*.

²⁰ *Boyd v. City Sav. Bank*, 15 Grat. 501. The court must have held the words "legal representative" to be surplusage. There should have been proof that the notice was received, unless the presumption is to be indulged that the postoffice is omniscient.

²¹ *Brent v. Washington Bank*, 2 Cranch, C. C. 517; *Bank of Wash-*

ington v. Pierson, 2 Cranch, C. C. 685; *Bird v. Doyal*, 20 La. Ann. 541.

²² Generally speaking, this situation would be impossible. The contingent liability would be presented as a claim and the administration would not be closed. But see *Christmas v. Flisker*, 7 Rob. (La.) 13; *New Orleans R. Co. v. Kerr*, 9 Rob. (La.) 122.

²³ See § 257, *ante*. There is one case where notice was served upon an indorser who was sick. It was sufficient. He was told what it was, but it did not appear that he heard. *Miles v. Hall*, 12 Smedes & M. 332.

binds the indorser who knows of the agreement,¹ and so it is that a custom of banks to give notice to the maker demanding payment on the first day of grace, and then giving notice forthwith without further demand, is binding upon the indorser if he knows of it, and the fact that the bank has the paper for collection,² even though the paper is not payable at the particular bank.³ The same rule is good as to banking customs for notice after the last day of grace.⁴ A custom of banks as to notes payable at the bank to give notices through the postoffice to people residing at the same place, in contravention of the recognized rule that such service must be personal, is binding upon indorsers of the paper.⁵ But a custom to give notice of dishonor before the close of banking hours on the last day of grace is not good,⁶ where the rule is held that the maker or acceptor or drawee has the whole of the last day of grace during banking hours in which to pay.⁷

§ 289. **Actual notice.**—Actual knowledge of dishonor is not the equivalent of notice.¹ The fact that an indorser was present when payment was demanded and refused does not excuse notice as to him,² unless, of course, he had taken the

¹ Pearson v. Bank of Metropolis, 1 Pet. 89.

² Jones v. Fales, 4 Mass. 245; North Bank v. Abbott, 13 Pick. 465; Central Bank v. Davis, 19 Pick. 373. See Farmers' Bank v. Duvall, 7 Gill & J. 78; Thorn v. Rice, 15 Me. 263.

³ See the preceding note for the cases.

⁴ Patriotic Bank v. Farmers' Bank, 2 Cranch, C. C. 560. See Adams v. Otterback, 15 How. 539. This case holds that a single bank cannot have a custom. The *dictum* is wrong. It is by McLean, J.

⁵ Chicopee Bank v. Eager, 9 Met. 583; Gindrat v. Mechanics' Bank, 7 Ala. 324; Carolina Nat. Bank v.

Wallace, 13 S. C. 347. See Lime Rock Bank v. Hewitt, 52 Me. 51.

⁶ Boston Bank v. Hodges, 9 Pick. 420. See Munroe v. Mandeville, 2 Cranch, C. C. 187.

⁷ See § 250, *ante*.

¹ Lane v. Bank of West Tennessee, 9 Heisk. 419; Phipps v. Harding, 70 Fed. R. 498; In re Grant, Fed. Cas. No. 5691; First Nat. Bank v. Zahm, 1 Atl. R. 190 (Pa.); Bank of Columbia v. Mackall, 2 Cranch, C. C. 631. But the case of Citizens' Nat. Bank v. Cade, 73 Mich. 449, is absolutely wrong, because there was an oral notice given which was good. The vice-president of the bank was acting for the bank.

² Grant v. Spencer, 1 Mont. 136.

note into his own hands to collect and to give notices.³ But this rule of notice by estoppel was not applied to an attorney who was himself the indorser upon a note which he was collecting.⁴ The reasoning of the court is somewhat strained, but the decision may be justified on the ground that it was no part of the attorney's duty to give the notices; yet an attorney with any sense of honor would hesitate to make such a defense. So knowledge of the dishonor obtained from the maker does not amount to notice to the indorser.⁵ The fact that the indorser was director of a bank where the note was dishonored, or that he had personal knowledge of the dishonor, is not notice;⁶ or the fact that one of the drawers was an acceptor does not excuse notice as to him;⁷ but notice is excused to a drawer who draws upon the firm of which he is a member.⁸ But, as we have seen, if notice is received from a proper source, it is immaterial that it came through an irregular channel or in an improper way,⁹ provided it was received in due time.¹⁰

§ 290. Excuses for failure to notify.—The use of due diligence may be considered as an excuse for failure to notify,

³ See § 298, *post*, notes 20, 21.

⁴ *Agan v. McManus*, 11 Johns. 180.

⁵ *Jagger v. German Am. Bank*, 53 Minn. 386.

⁶ *Lane v. Bank of West Tennessee*, 9 Heisk. 419.

⁷ *McMean v. Little*, 3 Baxt. 330.

⁸ *West Branch Bank v. Feltmer*, 3 Pa. 399; *Fuller v. Hooper*, 3 Gray, 334; *Gowan v. Jackson*, 20 Johns. 176. For the rule as to demand, see § 208, *ante*. But the fact that the maker is a partner of the indorser, and the same person acted for both, does not excuse either demand or notice. *Dwight v. Scovil*, 2 Conn. 654. See *Foland v. Boyd*, 23 Pa. 476; *In re Grant*, Fed. Cas. No. 5691. This rule is not applied where the indorsers are a majority

of the maker's board of directors (*Phipps v. Harding*, 70 Fed. R. 468, 34 U. S. App. 148); nor where a stockholder indorses for his corporation (*Field v. New Orleans Newspaper Co.*, 21 La. Ann. 24). *Contra*, *Hull v. Myers*, 90 Ga. 674. This is the case in which the judge delivering the opinion pompously announced that good sense and good law are the same unless violently sundered by judicial ignorance. In *Phipps v. Harding*, *supra*, the conclusion of the learned judge is pointedly condemned by a court of appeal. Query, which of the courts was judicially ignorant?

⁹ See § 281, *ante*, note 22.

¹⁰ See § 281, *ante*, note 22.

as may miscarriages in the mail, or failure of the person to deliver with whom the notice is left where a proper personal service has been made. Those cases have been considered.¹ The excuses for failure to demand or to give notice arising from the nature of the paper have also been considered.² An agreement between the maker and indorsee, postponing the time of presentment for payment, will not excuse a notice of non-payment to the indorser when dishonor takes place,³ unless the indorser became a guarantor or waived demand and notice.⁴ The absconding of the indorser or drawer,⁵ or his departure without leaving any address or agent⁶ that can be discovered with due diligence, excuses any service of notice. The same facts as to the drawer's lack of funds in the hands of the drawee that will excuse a demand upon the drawee will excuse notice to the drawer,⁷ but while it will excuse demand as to the indorser, it will not excuse notice of the dishonor to him,⁸ unless he was the real drawer of the bill or maker of the note.⁹ The question of the insolvency of the maker excusing a demand upon the maker and notice to the indorser has been noticed.¹⁰ The rule must necessarily be that where a demand upon the maker of a note is excused notice to the indorser is not excused,¹¹ unless he was a guarantor.¹² The insolvency of the drawee will not excuse notice to the drawer or indorser;¹³ nor will

¹ See § 274, *ante*.

² See § 208, *ante*.

³ *Sice v. Cunningham*, 1 Cow. 397; *Worden v. Mitchell*, 7 Wis. 161. So of paper indorsed overdue. Notice must be given upon dishonor. *Jones v. Robinson*, 11 Ark. 504; *McKeever v. Kirtland*, 33 Iowa, 348; *Grant v. Strutzel*, 53 Iowa, 712; *Rosson v. Carrol*, 90 Tenn. 90; but see *Jordan v. Hurst*, 12 Pa. 269. An agreement as to notice between the maker of the note, or the drawer of a bill and the holder, known to the indorser, is binding upon him.

Pearson v. Bank of Metropolis, 1 Pet. 89.

⁴ See § 241, *ante*, and § 298, note 25, and § 299, notes 6, 10, *post*.

⁵ *Williams v. Bank of United States*, 2 Pet. 96.

⁶ *Williams v. Bank of United States*, 2 Pet. 96.

⁷ See § 264, *ante*.

⁸ See § 264, *ante*.

⁹ *Farmers' Bank v. Van Meter*, 4 Rand. 553.

¹⁰ See § 263, *ante*.

¹¹ See §§ 264, 265, 266, *ante*.

¹² See § 241, *ante*.

¹³ See § 263, *ante*.

the insolvency of the drawer excuse notice to the indorser.¹⁴ The indorser of a check is in the position of the indorser of a bill and entitled to the same rights.¹⁵ Where a demand as to an indorser is excused on account of the fraud of the indorser,¹⁶ or on account of the fact that owing to a forgery the indorsement transfers nothing,¹⁷ notice to the indorser is not necessary. The case where the indorser of a note becomes personal representative of the deceased maker prior to dishonor has been hereinbefore noticed.¹⁸

§ 291. Effect of war and pestilence.—Where war has suspended the ordinary intercourse between two places, the transmission of notices between those places cannot be made.¹ While the state of war continues the giving of notice is nugatory.² It will not be any evidence of notice whatever. If the countries of the person to serve and the person to be served are at war, or if the ordinary commercial intercourse has been suspended by proper authority, notice cannot be transmitted; but if the district is merely disturbed by a state of war, the condition must be such as to prevent commercial intercourse between the two places.³ If means of communication exist, it is the duty of the person to trans-

¹⁴ See § 263, *ante*.

¹⁵ See § 237, *ante*.

¹⁶ See § 262, *ante*.

¹⁷ See § 244, *ante*.

¹⁸ See §§ 287, 289, *ante*.

¹ *Lane v. Bank of West Tennessee*, 9 Heisk. 419 (on the whole question involved this decision is wrong); *House v. Adams*, 48 Pa. 261; *Bell v. Hall*, 2 Duv. 288; *Hopkirk v. Page*, 2 Brock. 20.

² *Norris v. Despard*, 38 Md. 487; *Hardin v. Boyce*, 59 Barb. 425; *Farmers' Bank v. Gunnell*, 26 Grat. 131 (in this case the court held that a part of the secession ordinance was unconstitutional); *Bynum v. Apperson*, 9 Heisk. 632; *Bank of Old Dominion v. McVeigh*, 29 Grat.

546; *Union Bank v. Robertson*, 19 La. Ann. 72.

³ See note 1. Even if war exists it will not excuse the use of due diligence in trying to transmit notice. *Peters v. Hobbs*, 25 Ark. 67 (this case wrongly holds that the existence of a state of war is a question for the jury); *Dunbar v. Tyler*, 44 Miss. 1; *James v. Wade*, 21 La. Ann. 548. Interruption of the mail is not alone sufficient to excuse. *Citizens' Bank v. Pugh*, 19 La. Ann. 43. But a notice deposited in the mail under such conditions is nugatory. *Billgerry v. Branch*, 19 Grat. 393; *Shaw v. Neal*, 19 La. Ann. 156.

mit notices by those means. But the transmission of notice through a country with which both belligerents were at peace, or the use of a licensed vessel, was wrongly suggested.⁴ This cannot be considered a proper rule, for the better rule would be that such a notice was void.⁵ But the excuse or necessity for delay exists only so long as the state of war continues or the interruption continues;⁶ as soon as commercial intercourse is resumed, reasonable diligence must be exercised in the transmission of the notice.⁷ With the magnificent disdain for private rights exhibited by so many revolutionary bodies, especially strict constructionists, a southern state attempted by a secession ordinance to dispense with notice upon existing paper.⁸ The prevalence of an epidemic suspending ordinary business excuses notice,⁹ but, unlike a state of war, a notice served during the prevalence of the epidemic is good,¹⁰ even though there be a statute suspending demands and notices until fifteen days after the epidemic was declared at an end.¹¹

§ 292. Result of want of due notice.—As to all parties to negotiable paper entitled to claim notice, except the drawer of a check, who can claim recompense only to the extent of injury, those who have not been given notice in the manner hereinbefore described are absolutely relieved from all obli-

⁴ *United States v. Barker*, Fed. Cas. No. 14,519. This judge did not seem to know that such a notice would be invalid.

⁵ See cases in note 2.

⁶ *Norris v. Despard*, 38 Md. 487; *Farmers' Bank v. Gunnell*, 26 Gratt. 131, and cases in note 1, *supra*.

⁷ *Turner v. Patten*, 49 Ala. 406; *Harp v. Kenner*, 19 La. Ann. 63; *Morgan v. Bank of Louisville*, 4 Bush, 82; *Shaw v. Neal*, 19 La. Ann. 156. See *Apperson v. Union Bank*, 4 Cold. 445. This decision purports to be a treatise.

⁸ *Duerson v. Alsop*, 27 Gratt. 229. In this case the court held the se-

cession ordinance valid. See *Farmers' Bank v. Gunnell*, 26 Gratt. 131, which held it was governed by the Federal Constitution. It seems that the secession ordinance took Virginia out of the Union, and yet it remained in the Union. Such are the productions of Bourbonism.

⁹ *Tunno v. Lague*, 2 Johns. Cas. 1; *Hanauer v. Anderson*, 16 Lea, 340; *Apperson v. Bynum*, 4 Cold. 445 (*dictum*). *Contra*, *Roosevelt v. Woodhull*, Anth. N. P. 250.

¹⁰ *Hanauer v. Anderson*, 16 Lea, 340.

¹¹ *Hanauer v. Anderson*, 16 Lea, 340.

gation upon the paper,¹ unless notice has been waived in the manner stated in the next section. The same rule applies to a failure to present for acceptance paper that requires acceptance, and to a failure to make a demand where a demand is required. And the rules stated herein may be applied to those cases also. If the negotiable paper has been given in payment of a claim,² or indorsed in payment of a claim,³ the claim is extinguished to the amount of the paper. If the paper has been given or transferred as security for a debt, the maker or transferrer is entitled to a credit upon the debt to the amount of the paper, if it be lost through the pledgee's negligence.⁴ The matter of release will not be a question of injury suffered,⁵ whenever the debtor is an indorser, but will be a case of an obligation to arise upon the performance of a condition precedent, which condition was never performed. The analogy between the effect of a failure to make a demand for payment or for acceptance and a failure to give notice is complete.

ARTICLE V.—WAIVER OF DEMAND AND NOTICE.

§ 293. Waiver of demand and notice in general.—The waiver of acceptance of paper requiring acceptance has been

¹ Even if a new draft for the original is given, where the original liability of the drawer has been discharged, and the drawer in giving the new draft reserves his rights, the second draft is unenforceable against him. *Benton v. Martin*, 40 N. Y. 345. See s. c., 31 N. Y. 382.

² *Allen v. King*, 4 McLean, 128; *Halbrook v. Allen*, 4 Fla. 87; *Manney v. Coit*, 80 N. C. 300; *Dayton v. Trull*, 23 Wend. 345; *Denniston v. Imbrie*, 3 Wash. C. C. 396. For an exchange of checks, see *Foster v. Paulk*, 41 Me. 425.

³ *Murphy v. Phelps*, 12 Mont. 531; *Stam v. Kerr*, 31 Miss. 199; *Phoenix*

Ins. Co. v. Allen, 11 Mich. 501; *Shipman v. Cook*, 16 N. J. Eq. 251.

⁴ *Jennison v. Parker*, 7 Mich. 355; *Whitten v. Wright*, 34 Mich. 92; *Foote v. Brown*, 2 McLean, 369, applying the rule where a guarantor was held entitled to notice; *Shriner v. Keller*, 25 Pa. 61; *Moore v. Brungard*, 6 Miss. 557. See *Gallagher v. Roberts*, 2 Wash. C. C. 191.

⁵ *Shipman v. Cook*, 16 N. J. Eq. 251. But in order to claim strict rights as indorsers, the debtor transferring the collateral must have indorsed. *Boardman v. Steele*, 13 Conn. 547; *Vanwart v. Smith*, 1 Wend. 219.

examined in preceding sections.¹ The waiver of acceptance, it was said, does not dispense with demand of payment and notice of non-payment.² The waiver of demand or of notice or of both is now to be considered. This waiver may be express or implied. If express it may be oral or written unless a statute prohibits oral waivers. If written, it may result from the single waiver of the party making an express waiver by himself indorsing the waiver upon the paper, or may result from the indorsement of paper containing a waiver in the form of a stipulation incorporated in the body of the paper or prefixed to a preceding indorsement, or it may result from a blank indorsement delivered to an indorsee with authority to write a written waiver above the indorsement. The oral waiver may be either express or implied. If expressly made at the time of indorsement, a sharp division in the authorities exists as to whether it is provable under the parol evidence rule. The oral waiver may be implied from acts and circumstances. A promise to pay before maturity acted upon by the holder amounts to a waiver. The obtaining by the indorser of an extension of time for the principal debtor may amount to a waiver. The exaction of full indemnity by the indorser from the maker before maturity waives notice and demand. Other circumstances or acts have the same effect. The rule of law varies as to a waiver made before or after maturity. Whether a waiver after maturity and dishonor requires a new consideration is sharply disputed. A new promise to pay after release of the indorser, if made with knowledge, or a partial payment of the paper by the indorser, or an unconditional acknowledgment of liability, may have the effect of a waiver of a notice and demand. It will thus appear that there is much analogy between the rule applicable to a waiver of demand and notice, and to what amounts to a waiver of the statute of limitations. The various divisions of the subject will be treated in what seems to be the natural order.

¹ See § 209, *ante*.

² *English v. Wall*, 12 Rob. (La.) 132.

§ 294. **Who may make waiver.**—The person to be charged by demand and notice must make the waiver either himself or through an agent with express or implied authority. Where the agent's authority to waive demand and notice of dishonor is express, no difficulty can arise if it be kept in mind that the authority ends with the death of the principal, unless it is coupled with an interest. But the person who makes the waiver must be *sui generis* and not a married woman under disability.¹ But the latter case is not a frequent one now owing to "Married Woman's Acts." If the person be not *sui generis* he cannot, of course, grant authority to an agent. A partner may waive demand and notice for his firm, and may do it even after dissolution of the firm,² but in a peculiar case this has been denied.³ The agent of a corporation who is authorized to create a liability against the corporation may waive demand and notice for the corporation.⁴ But this ruling should properly be put upon the ground of a ratification by the corporation resulting from its reception of benefits, for the agent was acting for another party as well as for the corporation. It is therefore a case of express authority to the agent. Implied authority to waive may result from the fact that the person who makes the waiver is apparently in charge at the indorser's place of business in the absence of the indorser,⁵ or from the fact that the person is negotiating the note for the benefit of the indorser.⁶ The same rule would apply to the indorser and drawer of a bill of exchange. These last cases of implied authority are examples of an agency by estoppel, and it is needless, perhaps, to say that if the person receiving the waiver had notice (either personally or through his agent

¹ Marshall v. Overbay, 10 La. 161.

² Darling v. March, 22 Me. 184; Seldner v. Mt. Jackson Nat. Bank, 66 Md. 488. *Contra*, see case in note 6, *infra*, which is wrong.

³ Manney v. Coit, 80 N. C. 300 (dormant partner was sought to be bound). The case seems to be unsupported.

⁴ Whitney v. South Paris Mfg. Co., 39 Me. 316.

⁵ Johnson v. Zeckendorf, 12 Pac. R. 65 (Ariz.). There was no proof of special authority.

⁶ Driggs v. Driggs, 11 N. Y. St. R. 256.

receiving the waiver) of the lack of authority, the estoppel does not arise.

§ 295. **To whom the waiver should be given.**—A waiver must be made to one who is a holder of the paper or to some one for such a holder,¹ except that an agreement, it has been held, made by the indorser with the maker, that he would take up the note and pay it, inures to the benefit of the indorsee as a waiver of demand and notice.² Yet it is held that the indorser's agreement made with the maker to waive demand and notice does not inure to the benefit of the holder. The distinction ought to be this: if the promise is to the maker, whether it be made before maturity or after maturity, with knowledge of dishonor, it is binding³ and inures to the benefit of all the holders as a waiver.⁴ But if made after maturity without such knowledge, the promise, since it would not be good if made to the holder, is not good if made to the maker.⁵ The agreement to waive made with the maker by the indorser ought to be held good if it was communicated to the holder when he was holder and he relied upon it in not giving notice. There is also the case of the trustee under a mortgage; he so far represents the holder that a promise of waiver or a waiver made to him is good as made to the holder of the note.⁶ Even if the waiver is made to a person not a holder, but he afterwards becomes holder, the waiver is not binding,⁷ unless the indorser knew or intended that the person was about to become the holder and the holder actually relied upon the waiver in not giving notice.

¹ *Jerrey v. Wilber*, 1 Bailey, 453; *Attwood v. Haseldon*, 2 Bailey, 457; *Jaccard v. Anderson*, 37 Mo. 91.

² *Marshall v. Mitchell*, 35 Me. 221.

³ See the case in the last note, and *Boyd v. Cleveland*, 4 Pick. 525.

⁴ But *Brown v. Ferguson*, 4 Leigh, 37, is *contra* as to the promise of drawer to drawee.

⁵ See § 299, *post*, and *Jaccard v.*

Anderson, 37 Mo. 91. In this case the proof seems not to have been at all conclusive. If a waiver is made to the maker in order to be told or shown to the holder, it is no doubt binding as an estoppel.

⁶ *Riker v. Sprague Mfg. Co.*, 14 R. I. 402.

⁷ *National Bank v. Lewis*, 50 Vt.

622.

§ 296. **Express waiver in writing.**—Cases of guaranty are sometimes considered, and no doubt very properly so, as instances of waiver.¹ An indorser who writes the word “accountable” after his signature waives demand and notice;² but the word “unconditionally” after the indorser’s signature was not considered a waiver,³ nor is an indorsement in this form: “I assign on condition that the property of the maker and indorsers is exhausted before recourse on me.”⁴ The indorser who signs his name below that of another indorser whose name on the bill or note is accompanied by a waiver is considered also as having signed the waiver.⁵ The indorsing of a note which contains a waiver in the body of the note,⁶ or stamped on the back,⁷ or who signs such a bill of exchange, is bound by the waiver, and that is so even though he have a general agreement with the holder for notice upon all paper indorsed by him.⁸ The waiver may also arise from a general agreement,⁹ provided its proper construction will enable it to cover the particular paper in question.¹⁰ It follows from the parol evidence rule that an express waiver in writing that is general cannot be shown by evidence of a contemporaneous oral agreement to have been for a limited time,¹¹ or to have been subject to conditions not expressed in the waiver.¹² But a waiver in writing may be modified by an oral agreement afterward made.¹³

¹ See § 241, *ante*.

² *Furber v. Caverly*, 42 N. H. 74.

³ *Dowd v. Aaron*, 2 Hill (S. C.), 531.

⁴ *Duffy v. O’Conner*, 7 Baxt. 498.

⁵ *Portsmouth Sav. Bank v. Wilson*, 5 App. D. C. 8; *Parshley v. Heath*, 69 Me. 90. See *Central Bank v. Davis*, 19 Pick. 373.

⁶ *Dunnegan v. Stevens*, 122 Ill. 396; *Gordon v. Montgomery*, 19 Ind. 110; *Sohn v. Morton*, 92 Ind. 170; *Leeds v. Hamilton Paint Co.*, 35 S. W. R. (Tex.) 77; *Hoover v. McCormick*, 84 Wis. 215 (upon notes);

Neal v. Wood, 23 Ind. 523; *Lowry v. Steele*, 27 Ind. 168; *Bryant v. Merchants’ Bank*, 8 Bush, 43 (upon bills of exchange).

⁷ *Farmers’ Bank v. Ewing*, 78 Ky. 264.

⁸ *Bryant v. Lord*, 19 Minn. 396.

⁹ *Duval v. Farmers’ Bank*, 7 Gill & J. 44, 9 Gill & J. 31. See *Martin v. Perqua*, 65 Hun, 225.

¹⁰ *Studebaker v. Ryan*, 46 Kan. 273.

¹¹ *Hayes v. Fitch*, 47 Ind. 21; *Buckley v. Bentley*, 42 Barb. 646.

¹² See *Jones v. Albee*, 70 Ill. 34. The express written waiver cannot

¹³ This is the general rule as to all simple contracts.

The construction of express waivers is as follows: A waiver of protest waives a presentation for payment, demand and notice of non-payment.¹⁴ Waiver of notice of demand and protest waives all steps in the proper protest.¹⁵ A waiver of protest and notice waives demand as well as notice,¹⁶ and so would a waiver of protest or notice¹⁷ and a waiver of demand of protest.¹⁸ A waiver of demand seems to waive notice of non-payment — a very proper rule.¹⁹ But a waiver of notice,²⁰ or a waiver of notice of demand,²¹ or a waiver of notice of protest,²² does not waive a demand, unless it be accompanied with a guaranty.²³ A waiver of notice of protest and demand waives demand, protest and notice.²⁴ But a married woman, who by her indorsement charges her separate estate, does not waive demand or notice.²⁵ An agreement between the parties (drawer and payee) not to present

be supplemented by oral testimony in order to give it a greater effect. *Burke v. Ward*, 32 S. W. R. 1047. But see *contra*, *Mills v. Beard*, 19 Cal. 158, where the different waivers were contemporaneous. But the waiver, if ambiguous, may be explained by parol evidence. *Union Bank v. Hyde*, 6 Wheat. 572.

¹⁴ *First Nat. Bank v. Falkanhan*, 94 Cal. 141; *Fitch v. Citizens' Nat. Bank*, 97 Ind. 211; *Harvey v. Nelson*, 31 La. Ann. 434; *Carpenter v. Reynolds*, 42 Miss. 807; *Scott v. Greer*, 10 Pa. 103; *Jaccard v. Anderson*, 37 Mo. 91; *Cooke v. Pomeroy*, 65 Conn. 466; *Shaw v. McNeil*, 95 N. C. 535; *Continental Life Ins. Co. v. Barber*, 50 Conn. 567; *Carmena v. Mix*, 15 La. 165; *First Nat. Bank v. Hartman*, 110 Pa. 196; *Fisher v. Price*, 37 Ala. 407. See, however, *Johnson v. Parsons*, 140 Mass. 173 (waives notice but not demand); *Moffatt v. Griswold*, 1 Neb. 415 (waives demand but not notice).

¹⁵ *Johnson Co. Sav. Bank v. Lowe*, 47 Mo. App. 151.

¹⁶ *Gordon v. Montgomery*, 19 Ind. 110; *Baker v. Scott*, 29 Kan. 136; *Walford v. Andrews*, 29 Minn. 250; *Walker v. Popper*, 2 Utah, 96. *Contra*, *Scull v. Mason*, 43 Pa. 99, *semble*.

¹⁷ *Hatley v. Jackson*, 48 Md. 254.

¹⁸ *Porter v. Kembell*, 53 Barb. 467.

¹⁹ *Dye v. Scott*, 35 Ohio St. 194; *Jaccard v. Anderson*, 37 Mo. 91.

²⁰ *Lane v. Steward*, 20 Me. 98; *Buchanan v. Marshall*, 22 Vt. 561.

²¹ *Voorhees v. Atlee*, 29 Iowa, 49; *Drinkwater v. Tibbets*, 17 Me. 16; *Berkshire Bank v. Jones*, 6 Mass. 524; *Backus v. Sheperd*, 11 Wend. 629.

²² *Buckley v. Bentley*, 42 Barb. 646; *Sprague v. Fletcher*, 8-Oreg. 367.

²³ *Farmer v. Sewell*, 16 Me. 456; *Backus v. Sheperd*, 11 Wend. 629.

²⁴ *Hammett v. Frenworthy*, 51 Mo. App. 281.

²⁵ *Jaffray v. Krauss*, 79 Hun, 449.

a check amounts to a waiver of demand and notice²⁶ as to the drawer, as well as to an indorser if he were a party to the agreement.²⁷

§ 297. Filling up of blank.—The general rule is said to be that if a written waiver appears above the signature of an indorser, it is presumed to have been placed there with his authority.¹ The courts are badly divided upon the question whether, if the actual agreement upon indorsement were for a waiver, the delivery of a blank indorsement impliedly authorizes the holder to insert the waiver above the indorsement.² But if the authority to write the indorsement is denied by evidence to show that the waiver was unauthorized, it devolves upon the holder to prove the authority.³ The mere delivery of a regular blank indorsement, with authority to fill it up, does not authorize the writing of a waiver above it,⁴ even though the indorser authorized the holder to fill it up as he thought proper.⁵ Where authority is granted in this way it is generally by parol, and if the waiver is required to be written, as some statutes provide, it might be contended that the authority to write the waiver should be in writing; but the writing of the waiver is not the execution of a contract for another, but the mere filling up of the contract already executed and signed by the person to be charged. For a like reason the writing of the waiver is not a modification of the indorsement by parol evidence. Therefore, in all cases, whether an oral waiver be valid or not, the filling up of a blank indorsement according to agreement, express or implied, ought to be perfectly valid. An anomalous indorsement, that is to say one made by a stranger, wherever

²⁶ Culver v. Marks, 122 Ind. 534.

²⁷ Barclay v. Weaver, 19 Pa. 396; and see § 298, note 25, and § 299, notes 6, 10.

¹ Farmer v. Rand, 14 Me. 225.

² Fowler v. Fleming, 1 McMul. 282. *Contra*, Farwell v. St. Paul Trust Co., 45 Minn. 495; and see the

next section for the general discussion.

³ Farmer v. Rand, 14 Me. 225.

⁴ Catlin v. Jones, 1 Pin. 130; Andrews v. Simons, 33 Ark. 771; Hill v. Martin, 12 Mart. (O. S.) 177.

⁵ Kimbro v. Lamb, 4 Humph. 95.

it is held to be a guaranty, ought to permit of a waiver being written above it if there were no other actual agreement.⁶

§ 298. **Parol waiver.**—The waiver of the necessity for demand and notice may be made by parol¹ unless the statute or rule of law held in the jurisdiction expressly requires the waiver to be written;² but even in the latter case a person may be estopped by his conduct from insisting upon a written waiver.³ This waiver may be made at any time after indorsement. It is difficult to see how a waiver could be made before indorsement, except by the drawer of a bill under certain peculiar circumstances, which are to be classed as excuses for making a demand and giving notice.⁴ If the waiver is made at the time of indorsement, as we saw in the last section, it is equivalent to an authority to write a waiver above the indorsement and is not a case of a parol modification of a written contract. So where the agreement is for an actual waiver at the time of the indorsement, it is difficult to see what effect the parol evidence rule can have.⁵ The theory and rationale of the doctrine is that the indorser, by his waiver or by his promise to be liable as a guarantor, makes the holder his agent to insert the contract above the blank indorsement which he gives to him. This authority can be given by parol, just as he could authorize a man to sign his name. The sole question involved is whether, by

⁶ This merely makes the indorsement what it purports to be on its face.

¹ *Annaville Nat. Bank v. Kettering*, 106 Pa. 531; *Maples v. Traders' Deposit Bank*, 15 Ky. Law R. 879; *Edwards v. Tandy*, 36 N. H. 540; *Fuller v. McDonald*, 8 Me. 213; *Kaiser v. Nial*, 9 Mo. App. 590; *Barclay v. Weaver*, 19 Pa. 396; *Andrews v. Simms*, 33 Ark. 771; *Schmeid v. Frank*, 86 Ind. 250; *Taunton Bank v. Richardson*, 5 Pick. 436. A parol waiver of a demand may be shown

with a written waiver of notice. *Mills v. Beard*, 19 Cal. 158. *Contra*, *Buckley v. Bentley*, 48 Barb. 283. For the language used in waiving, see *Taunton Bank v. Richardson*, 5 Pick. 436.

² *Thomas v. Mayo*, 56 Me. 40; *First Nat. Bank v. Maxfield*, 83 Me. 576.

³ *Hallowell Nat. Bank v. Marston*, 85 Me. 488.

⁴ See §§ 262, 290, *ante*.

⁵ See the last section. A parol waiver on an assignment is good. *Dick v. Martin*, 7 Humph. 263.

making such an agreement and executing the blank indorsement; he authorizes the holder to fill it up. If there is authority to fill it up, neither the parol evidence rule nor a statute requiring a writing is violated, for the contract is written. But reasonable as the above rule seems to be, it is settled by the great preponderance of authority, in spite of text writers to the contrary, that parol evidence is inadmissible to show a parol waiver or a parol guaranty contemporaneous with a regular indorsement.⁶ But in the case of an anomalous indorsement, the actual contract of indorsement may be, and in some states must be, shown by parol.⁷ Where the anomalous indorser is a guarantor or original promisor by law, the indorser may not show, according to some authority, the actual contract to rebut the contract of guaranty inferred from the nature of the indorsement.⁸ In other states where the anomalous indorser is merely an ordinary indorser, parol evidence is admissible to show a parol contract of guaranty,⁹ but this holding is denied.¹⁰ But the proper rule would seem to be that in no case should the contract raised by the law from the nature of the indorsement be reduced by parol evidence as against a *bona fide*

⁶ *Rodney v. Wilson*, 67 Mo. 123; *Beiler v. Frost*, 70 Mo. 185. Or a guaranty. *Barnard v. Galin*, 23 Minn. 192; *Farwell v. Trust Co.*, 45 Minn. 495; *Barry v. Morse*, 3 N. H. 132; *Bank of Albion v. Smith*, 27 Barb. 489; *Schmitz v. Hawkeye Co.*, 8 S. D. 544, and cases therein. See *Stack v. Beach*, 74 Ind. 571, as to what may be shown by parol evidence. These cases follow the English rule. This rule could not apply to a parol waiver after indorsement.

⁷ *Rey v. Simpson*, 22 How. 341; *Cady v. Shepard*, 12 Wis. 639; *Bright v. Carpenter*, 9 Ohio, 139; *Featherstone v. Hendrick*, 59 Ill. App. 497; *Owings v. Baker*, 54 Md. 82; *Kuntz*

v. Tempel, 48 Mo. 71; *Stack v. Beach*, 74 Ind. 571; *Chaddock v. Vanness*, 35 N. J. Law, 517.

⁸ *Dale v. Gear*, 38 Conn. 15; *Allen v. Brown*, 124 Mass. 77; *Dennis v. Jackson*, 108 Mich. 295; *Watson v. Hart*, 6 Grat. 633. *Contra*, *Rey v. Simpson*, 22 How. 341; *White v. Weaver*, 41 Ill. 409; *Kingsland v. Koeppel*, 137 Ill. 344; *Strong v. Riker*, 16 Vt. 554.

⁹ *McComb v. Thompson*, 2 Minn. 139; *Coulter v. Richmond*, 59 N. Y. 478; *Deering v. Creighton*, 19 Ore. 118; *Wells v. Jackson*, 6 Blackf. 40.

¹⁰ *Heath v. Van Cott*, 9 Wis. 516 (seemingly overruled by *Cady v. Shepard*, 12 Wis. 639); *Stack v. Beach*, 74 Ind. 571, *semble*.

holder,¹¹ although the same objection would not exist to evidence adding to the contract terms beneficial to the holder.¹² This parol waiver in jurisdictions which permit such proof as to an indorsement may be proved as between indorser and indorsee.¹³ The waiver may also be made after indorsement. In case the statute or the rule of law requires a written waiver, a waiver after indorsement would necessarily be in writing, because the holder would not be authorized to write the waiver above the indorser's signature.¹⁴ But where a written waiver is not required this waiver may be made at any time before maturity,¹⁵ and by much authority after maturity, as will appear in a succeeding section. A parol waiver may be proved by facts and circumstances¹⁶ as well as by words.¹⁷ Cases examining the evidence to support such a waiver may be found in the note below.¹⁸ This waiver arises from the indorser's request to the holder not to protest the paper,¹⁹ or by the indorser wrongfully taking possession of the paper before maturity and retaining it until after maturity,²⁰ or by the indorser's taking the paper and attempting himself to collect it.²¹ But the mere presence of the indorser at the demand is not a waiver,²² nor the fact that the indorser aided the holder in collecting interest upon the note.²³ But if the indorser induces the holder to give time to the maker at the time of indorsement, or before or at maturity, his conduct is a waiver of demand and notice at the maturity of the note,²⁴ but some authority

¹¹ *Schneider v. Schiffman*, 20 Mo. 571; *Salisbury v. First Nat. Bank*, 37 Neb. 872.

¹² This view of the matter seems to be sound on principle.

¹³ *Dye v. Scott*, 35 Ohio St. 194. See note 6, *supra*.

¹⁴ See cases in note 2, *supra*.

¹⁵ See the next section.

¹⁶ See cases in note 1, *supra*.

¹⁷ See cases in note 1, *supra*.

¹⁸ *Teconic Bank v. Johnson*, 21 Me. 426; *Oswego Bank v. Knower*, Hill & D. Supp. 122; *Lary v.*

Young, 13 Ark. 401; *Taunton Bank v. Richardson*, 5 Pick. 436. For language not a waiver, see *Kent v. Warner*, 94 Mass. 561; *Wright v. Liesenfeld*, 93 Cal. 90.

¹⁹ *Scott v. Grier*, 10 Pa. 103.

²⁰ *Havens v. Talbot*, 11 Ind. 323.

²¹ *Braine v. Spaulding*, 52 Pa. 247.

²² *Grant v. Spencer*, 1 Mont. 136.

²³ *Isham v. McClure*, 58 Iowa, 515.

A contrary decision in this case would have been proper.

²⁴ *Marsh v. Badcock*, 2 D. Chip. 124; *Hudson v. Wolcott*, 39 Ohio St. 618;

holds that it is not so as to demand and notice at the expiration of the extension.²⁵ If the indorser himself gives security upon the note, it seems that the security may be enforced, although the note was not demanded nor notice of non-payment given.²⁶ The commonest form of waiver before maturity is examined in the next section.

§ 299. Promise to pay before maturity.—A promise by the indorser to pay the note, made before maturity, is a promise essentially different from the promise made by the indorsement. If this promise is orally made at the time of the indorsement, the difficulty, as we have already indicated, is that the indorsement makes a written contract, while the parol contemporaneous agreement to pay at all events contradicts the engagement which the written indorsement shows.¹ The difficulty is not obviated when, instead of a promise to pay, the parol contemporaneous agreement is one of guaranty.² The exception where such proof of waiver is allowed is generally as to the contract of the anomalous indorser.³ But where the indorsement is regular, such parol proof is in general inadmissible where it is to show a contemporaneous waiver.⁴ Where a promise to pay is made before maturity upon a regular indorsement, the question that theoretically presents itself is one of consideration. But since a consideration may be a detriment to the promisee as well as a benefit to the promisor, there is one branch of the rule which says that if the indorser's promise to pay induces the holder to refrain from making

Whittier v. Collins, 15 R. I. 44. *Contra*, Michaud v. Legarde, 4 Minn. 43. But see Hart v. Eastman, 7 Minn. 74. See note 6 to the following section.

²⁵See Hart v. Eastman, 7 Minn. 74; Worden v. Mitchell, 7 Wis. 161. *Contra*, Sheldon v. Horton, 43 N. Y. 93, and the cases in notes 5 and 10 to the following section.

²⁶Cardwell v. Allen, 33 Grat. 160.

The security must be considered that of the maker. But the indorser may become absolutely liable. Hoover v. Glasscock, 16 La. 242.

¹Baskerville v. Harris, 41 Miss. 535. But *contra*, Worden v. Mitchell, 7 Wis. 161.

²See § 298, *ante*, notes 5, 6.

³See § 298, *ante*.

⁴See § 298, *ante*.

a demand and from giving notice, the promise is binding, whether express or by implication.⁵ This promise may be the offer of a new note in renewal,⁶ or an implied promise to pay.⁷ Considered as a promise the legal theory of the contract of waiver must be that the new promise is a continuing offer to pay, including therein a waiver of demand and notice, which is accepted by the holders acting upon it by not making a demand. This theory is inadequate, for if it be a continuing offer, it could be accepted at any time after it was made and before the time came for a demand. An express acceptance ought in that event to bind the promisor. But this statement of the obligation shows no consideration. The new promise cannot be considered an estoppel, even if acted upon, because it is a promise, not a representation of any fact. So we are driven to the conclusion that the new promise, a nullity in itself,⁸ becomes, and can become, binding as an actual contract only by the giving of some consideration. A consideration is given by the detriment to the holder in acting upon the promise. Till that is done the promise ought in theory to be revocable as an offer. If, however, the holder, relying upon the promise, should release the maker or his surety, could such a detriment be an acceptance of the offer? Probably it would not be so, because the new promise is merely a waiver. It does not render the indorser any the less a surety *sub modo* for the maker, and the act of releasing the maker or his se-

⁵ Sigerson v. Mathews, 20 How. 143; Lititz Nat. Bank v. Siple, 145 496; Leffingwell v. White, 1 Johns. Pa. 49.

Cas. 99; Lane v. Stewart, 20 Me. 98; ⁶ First Nat. Bank v. Ryerson, 23 Hale v. Danforth, 46 Wis. 554; Kyle Iowa, 508; National Hudson R. Bank v. Green, 14 Ohio, 490; Markland v. Reynolds, 57 Hun, 307; Jenkins v. White, 147 Pa. 303, and Glaze v. McDaniell, 51 Kan. 350; First Nat. Bank v. Connaway, 4 Houst. 206; Ferguson, 48 Kan. 157. And see Schley v. Merritt, 37 Md. 352; Sieger v. Second Nat. Bank, 132 Pa. note 24 to the last section.

307; Lary v. Young, 13 Ark. 401; ⁷ Stahl v. Wolfe, 6 Wkly. Notes Cas. 143.

Bryant v. Wilcox, 49 Cal. 47; Blaffer v. Herman, 7 La. Ann. 659; ⁸ It is not a promise to pay a debt, because no debt exists. Reiff v. Stahl v. Wolfe, 6 Wkly. Notes Cas. McMiller, 45 Leg. Int. 26.

curity would probably release the indorser. Therefore it seems reasonably certain that the only way in which the offer can be accepted is by the holder's acting upon it at maturity, except where the time of payment is extended. The extension of time, with the concurrence of the parties before maturity, is theoretically, but not legally, a waiver only until the extended day of maturity.⁹ But if the extension of time is, or is not, accompanied on the part of the indorser with a promise to pay the note upon maturity, or a guaranty or a waiver, there is an absolute waiver of demand and notice at any time.¹⁰ This may be treated on the theory that the indorser thereby becomes a maker. The cases, however, show that the new promise is merely a waiver going in support of the original contingent liability on the paper. Nothing short of an unqualified promise to pay seems sufficient as a waiver. Thus, if the holder notifies the indorser before maturity that he looks to him for payment, he does not thereby affect the right of the indorser to demand and notice,¹¹ or if the holder and the indorser, at the time of indorsement, agree that the maker is not to be sued until the indorser notifies the holder to sue, the demand and notice is not waived by the indorser.¹² The indorser who appears at a meeting of the creditors of the maker, and by reason of his indorsement takes the position of a creditor, does not waive notice and demand,¹³ nor is a request by the indorser of the holder not to sue during the former's absence.¹⁴ But if the demand is omitted at the indorser's request at maturity,¹⁵ there is a waiver both of the demand and notice.

⁹ See note 25 to last section. But Good v. Arrowsmith, Anth. N. P. see the cases cited in note 6, *supra*. 289. See Boyd v. Cleveland, 4 Pick.

¹⁰ Cady v. Bradshaw, 116 N. Y. 524.

188; Sheldon v. Horton, 43 N. Y. 12 Freeman v. O'Brien, 38 Iowa, 93; Amoskeag Bank v. Moore, 37 406.

N. H. 539; Norton v. Lewis, 2 Conn. 13 Miranda v. City Bank, 6 La. 740.

478; Farmers' Bank v. Catlin, 13 14 Dutton v. Bratt, 11 S. W. R. 821 Vt. 39; Long v. Moore, 2 Brev. 172; (Ark.).

Blanc v. Mutual Nat. Bank, 28 La. 15 Whittier v. Collins, 15 R. I. 44. Ann. 921. And see note 10, *supra*.

¹¹ Davis v. Gowen, 19 Me. 447;

§ 300. **Indemnity as a waiver.**—An indorser who protects himself by receiving security from the principal debtor, the maker of the note, or from a prior indorser, waives his right to demand and notice,¹ provided the security is sufficient to cover his contingent liability,² or provided the security is the whole estate of the indorser whether it be sufficient or not.³ Or if the note is secured by a mortgage or pledge of property of the maker, and the indorser takes the property from the maker, agreeing to take care of the note, he waives thereby demand and notice;⁴ or if the indorser takes property of the maker, and as the price thereof agrees to pay the note, he likewise binds himself by waiver.⁵ If the indorser holds, however, security to which he is entitled not by virtue of a transfer to cover his liability, he does not waive his rights.⁶ The limitations upon this rule are that the indorser agree to the transfer to himself;⁷ that the transfer must either be of the whole estate of the maker or of sufficient property to cover his liability,⁸ and that the

¹ *Stephenson v. Primrose*, 8 Port. 155; *Mead v. Small*, 2 Me. 207; *Lewis v. Kramer*, 3 Md. 265; *Walker v. Walker*, 7 Ark. 542; *Barrett v. Charleston Bank*, 2 McMul. 191; *Durham v. Price*, 5 Yerg. 300; *Beard v. Westerman*, 32 Ohio St. 29. But see *Woodbury v. Crum*, 1 Biss. 284; *Woodman v. Eastman*, 10 N. H. 359; *Kramer v. Sanford*, 4 Watts & S. 328; *Seacord v. Miller*, 13 N. Y. 55. *Contra*, *Whittier v. Collins*, 15 R. I. 44. The rule applies as against a prior indorser in favor of a subsequent indorser. *Walker v. Walker*, 7 Ark. 542; *Duvall v. Farmers' Bank*, 9 Gill & J. 31.

² See cases in preceding note and *Burrows v. Hannegan*, 1 McLean, 309; *Spencer v. Harvey*, 17 Wend. 489; *Brunson v. Napier*, 1 Yerg. 199; *Marine Bank v. Smith*, 18 Me. 99.

³ See cases in two preceding notes and *Mechanics' Bank v. Griswold*, 7 Wend. 165; *Coddington v. Davis*, 3 Denio, 16, 1 N. Y. 186; *Barton v. Baker*, 1 S. & R. 334; *Bank of South Carolina v. Meyers*, 1 Bailey, 412. See *Moses v. Ela*, 43 N. H. 557; *Woodbury v. Crum*, 1 Biss. 284.

⁴ *Armstrong v. Chadwick*, 127 Mass. 156. But see *Coghlan v. Dinsmore*, 9 Bosw. 453.

⁵ *Whitridge v. Rider*, 22 Md. 548; *Andrews v. Boyd*, 3 Met. 434. Or if he receives property upon an agreement to pay the note. *Wright v. Andrews*, 70 Me. 86; *Ray v. Smith*, 17 Wall. 411.

⁶ *Cruger v. Luedheim*, 16 S. W. R. 420 (Tex.).

⁷ *Holman v. Whiting*, 19 Ala. 703.

⁸ See notes 1, 2 and 3, *supra*.

transfer was made to cover the particular claim, and not all his claims in the aggregate against the maker;⁹ and finally, that the security be given while the indorser's liability continued.¹⁰ If he had already been discharged by a failure to give him notice, he may take security with impunity. It seems that if the assignment is to a third party in trust to pay the indorser and others, there is no waiver.¹¹ But an assignment of all the maker's property to a trustee for the purpose of paying all the debts of the maker ought to be equivalent to a waiver, since the theory of this rule as to indemnity is that the indorser has no remedy over against the drawer.¹² The whole rule is illogical, but since it is established it ought to be consistent. Since the indorser, under the rule, is entitled to all the property of the maker, where the indemnity is insufficient, a transfer to the indorser of part of the maker's property, if it be insufficient to cover the indorser's liability, is not a waiver, although it should turn out to be all the property of the maker at maturity.¹³ The taking of indemnity was in one court construed to be a provision against a liability, provided the liability should be fixed by demand and notice.¹⁴

§ 301. Waiver after maturity.—The waiver of demand and notice after maturity presupposes that the indorser has already been released. For such a waiver there would seem to be no consideration, if it is gratuitous. But the question is: Is a waiver a contract? One set of courts replies to the question that demand and notice are but steps in the rem-

⁹ Van Norden v. Buckley, 5 Cal. 283; Haskell v. Boardman, 90 Mass. 38 (here all the property was conveyed); Carlisle v. Hill, 16 Ala. 398. See Barton v. Baker, 1 S. & R. 334.

¹⁰ Tower v. Durell, 9 Mass. 332; Sanderson v. Sanderson, 20 Fla. 292; Carlisle v. Hill, 16 Ala. 398; Walters v. Munroe, 17 Md. 154; Peets v. Wilson, 19 La. 478; Moore v. Coffield, 1 Dev. 247; Swan v. Hodges, 3 Head, 251.

¹¹ Denny v. Palmer, 5 Ired. 610. See Coddington v. Davis, 3 Denio, 16; Creamer v. Perry, 17 Pick. 332.

¹² See Ray v. Smith, 17 Wall. 411, and cases in note 3, and Second Nat. Bank v. Maguire, 33 Ohio St. 295; Woodbury v. Crum, 1 Biss. 284.

¹³ Brandt v. Mickle, 28 Md. 436.

¹⁴ Selby v. Brinkley, 17 S. W. R. 479. But see cases in notes 1, 2 and 3, *supra*.

edy, and may be waived at any time without any necessity for a consideration appearing.¹ The other set of courts maintains that it is a contract, and, after maturity, must be supported by a consideration, or by a new and valid promise to pay, supported by a consideration.² But all the courts admit that a waiver before maturity needs no consideration to support it.³ They do not find it necessary to seek out a consideration from the fact that the waiver has been acted upon, and hence the position of those courts which deny efficacy to a waiver after maturity has no support in their own reasoning.⁴ But an agent could not bind his principal by a waiver after maturity,⁵ unless he had express authority to waive, or unless his act were ratified. A bankrupt indorser may waive demand and notice, prior to the choice of an assignee, either before or after maturity, and without consideration in those jurisdictions which do not require a consideration for a waiver after maturity.⁶

§ 302. New promise after maturity.—A new promise to pay the note after maturity, made by the indorser with knowledge of his release, is binding upon him as a new and valid contract,¹ dispensing with the proof of demand and

¹ Yeager v. Farwell, 13 Wall. 6 (this is a rambling sort of an opinion by Justice Davis); Matthews v. Allen, 16 Gray, 594; Harrison v. Bailey, 99 Mass. 620; Rindge v. Kimball, 124 Mass. 209; Lockwood v. Bock, 50 Minn. 142; Cheshire v. Taylor, 29 Iowa, 492; Barclay v. Weaver, 19 Pa. 396; Pollard v. Brown, 57 Ind. 232; Bank of Columbia v. Mackall, 2 Cranch, C. C. 681; Hoadley v. Bliss, 9 Ga. 303 (if waiver of proof).

² Seebree Bank v. Moreland, 96 Ky. 150, *semble*; Landrum v. Trowbridge, 2 Met. (Ky.) 281; Ralston v. Bullitts, 3 Bibb, 261; Huntington v. Harvey, 4 Conn. 124; Walters v. Swallow, 6 Whart. 446 (an accommodation indorser); Brown v.

Teague, 52 N. C. 573; Robinson v. Barret, 19 Fla. 670, *semble*; Wyckoff v. Andrews, 50 N. Y. Super. Ct. 196.

³ See the foregoing cases, and Neal v. Wood, 23 Ind. 523.

⁴ If the waiver is made after indorsement and before maturity, no extension being granted, where is there any consideration until the waiver is acted upon?

⁵ Grosvenor v. Stone, 8 Pick. 79.

⁶ Ex parte Tremont Nat. Bank, 2 Low. 409.

¹ Yeager v. Farwell, 13 Wall. 6; Curtis v. Sprague, 51 Cal. 239; Harmon v. Moffett, 6 D. C. 297, *semble*, are as to indorsers of notes; Stone v. Smith, 30 Tex. 138; Benoist v. Creditors, 18 La. 522, are as to drafts.

notice.² But either the promise must be unqualified,³ or, if conditional, it must appear that the condition has been performed.⁴ This rule applies to indorsers and drawers of all kinds of commercial paper.⁵ The reason for such a rule is not apparent. The case has no analogy to one under the statute of limitations, although it is so treated. There is no consideration for the promise, if it is considered a promise, not even a moral or meritorious consideration, because the indorser was never under any obligation to pay. The new promise after maturity is perhaps considered as a waiver of demand and notice, but a promise to pay before maturity required, as has been seen, a consideration to support it by being acted upon.⁶ Probably it is for the reason that no consideration exists that the promise after maturity must appear to have been made with full knowledge on the indorser's part that he has been released by a failure to give him notice of demand and non-payment.⁷ One court applying a distinction made by Lord Westbury between ignorance of an abstract principle of law and ignorance of the application of the principle to the facts has held that the indorser must know not only that no demand has been made or notice not given to him, but must also know all other facts material to form a conclusion as to his liability.⁸ The promise to pay is presumptive evidence of demand and notice,⁹

See also cases in note 7, *infra*. As to the language of a new promise, see *Glendenning v. Canary*, 5 Daly, 489; *Martin v. Perqua*, 65 Hun, 225.

² *Campbell v. Varney*, 12 Iowa, 43, and cases in the last note.

³ See next note.

⁴ *Keith v. Mackey*, 5 Rob. (La.) 277; *Turnbull v. Maddox*, 68 Md. 579; *Campbell v. Varney*, 12 Iowa, 43.

⁵ See cases in note 1, *supra*.

⁶ See § 299, *ante*.

⁷ *Thornton v. Wynn*, 12 Wheat. 183; *Walker v. Rogers*, 40 Ill. 278; *Moore v. Cofield*, 1 Dev. 247; *Arnold*

v. Dresser, 90 Mass. 435; *Miller v. Hackley*, 5 Johns. 375; *Landrum v. Trowbridge*, 2 Met. (Ky.) 281, and many other cases. But negligence as to means of knowledge may amount to knowledge. *Hayes v. Werner*, 45 Conn. 246.

⁸ *Low v. Howard*, 10 Cush. 159. See *Matthews v. Allen*, 16 Gray, 594, and *Breen v. Buttorf*, 3 Tenn. Ch. 285 (this case is absolutely wrong).

⁹ *Yeager v. Farwell*, 13 Wall. 6, and the cases in note 1, *supra*, and *Pierson v. Hooker*, 3 Johns. 68; *Breed v. Hillhouse*, 7 Conn. 523; *Hazard v. White*, 26 Ark. 155;

and it follows from the fact of such a promise appearing that the burden is thrown upon the indorser to show that he had no knowledge of his release.¹⁰ But so far is the matter of necessity of knowledge on the indorser's part carried, that a note given by the indorser for a draft upon which the indorser had been released is invalid for want of consideration if the indorser did not know that he was released.¹¹ The transfer of the note after dishonor by the indorsers,¹² or the act of the indorsers in causing the holder to take the note overdue,¹³ is a waiver of demand and notice. The rule at common law is that the admission of liability by one joint contractor binds his co-contractor.¹⁴ The same rule would probably apply to a new promise. Where a failure to notify one joint indorser has released all the indorsers, the new promise of one released imposes the liability to pay upon all.¹⁵ The new promise must be made just as a waiver must be made, to some one interested in the paper,¹⁶ who can hold that indorser liable upon the paper, and it inures, perhaps, to the benefit of all the holders of the paper to whom he is liable.¹⁷

§ 303. Part payment after maturity.—A partial payment of the note by the indorser is equivalent to a new promise to pay,¹ if the money to make payment came from

Walker v. Laverty, 6 Munf. 487;
Lewis v. Brehme, 33 Md. 412; *Robbins v. Pinckard*, 5 Smedes & M. 51.

¹⁰ This presumption ceases as soon as it appears that the notice was defective, it is said, but certainly incorrectly. See *Newberry v. Trowbridge*, 13 Mich. 263. That is the principle which is applied to an acknowledgment of due service of notice. But an agreement to consider the demand and notice as good is practically a new promise. *Duryee v. Denison*, 5 Johns. 248. *Todd v. Neal*, 49 Ala. 266. See *Bolling v. Mackenzie*, 89 Ala. 470.

¹¹ *Fernald v. Bush*, 131 Mass. 591.

¹² *St. John v. Roberts*, 31 N. Y. 441.

¹³ *Libbey v. Pierce*, 47 N. H. 309.

¹⁴ *Dickerson v. Turner*, 12 Ind. 223.

¹⁵ See *Sherer v. Easton Bank*, 33 Pa. 134, as to a partial payment.

¹⁶ *Olendorf v. Swarty*, 5 Cal. 480; *Gassaway v. Jones*, 2 Cranch, C. C. 334; *Clark v. Tryon*, 23 N. Y. Supp. 780; *Caldwell v. Porter*, 17 N. H. 27.

¹⁷ *McKennon v. McRae*, 7 Port. 175; *Little v. Blunt*, 9 Pick. 488; and see last case in preceding note.

¹ *Curtiss v. Martin*, 20 Ill. 557; *Washer v. White*, 16 Ind. 136; *Frost v. Harrison*, 8 La. Ann. 123; *Sigourney v. Witherell*, 6 Met. 553; *Bibb v. Peyton*, 11 Smedes & M. 275; *Johnson v. Crane*, 16 N. H. 68; *Shaw v. McNeill*, 95 N. C. 535; *Levy v.*

the indorser,² and if the indorser knew that he had been released.³ The partial payment without more appearing is presumptive proof of demand and notice, just as a new promise is,⁴ and the burden is upon the indorser to show that he had no knowledge of his release.⁵ A confession of judgment, or a judgment by default suffered by the indorser for the amount of the note, may be considered, perhaps, in the light of a partial payment, for it is certainly not a new promise to pay, because it creates a *quasi*-contract, not an actual contract. The absolute presumption of waiver resulting arises rather from the rule of law that a party having had an opportunity to plead a certain defense, and failing to do so, is forever concluded, or it results from the form of the authority to confess judgment. It is an absolute waiver of demand and notice, or, what is the same thing, absolute proof thereof.⁶ At common law a partial payment by one joint indorser released would bind perhaps the other indorsers.⁷ There is a difficulty here, however, in the fact that the indorser who makes the payment may have knowledge that he is released, while the other joint contractors may not have such knowledge. In the latter case probably they would not be bound. A partial payment inures to the benefit of all the holders of the paper.⁸

§ 304. Acknowledgment of liability.—An unconditional acknowledgment of liability upon the paper after its maturity, made with knowledge of a release, operates as a waiver

Peters, 9 S. & R. 125. See, however, for a partial payment in depreciated paper, *Newberry v. Trowbridge*, 13 Mich. 263.

² *Reinke v. Wright*, 93 Wis. 368; *Whitaker v. Morrison*, Branch, 25.

³ *Buckley v. Bentley*, 42 Barb. 646; *Shaw v. McNeill*, 95 N. C. 535.

⁴ See preceding section.

⁵ See preceding section. If the knowledge existed, the *prima facie*

case becomes a conclusive and indisputable presumption.

⁶ *Hall v. Jones*, 32 Ill. 38; *Winn v. Levy*, 2 How. (Miss.) 902; *Grigsby v. Ford*, 3 How. (Miss.) 184. But it is said to be merely *prima facie* proof. *Richter v. Selin*, 8 S. & R. 425.

⁷ *Sherer v. Easton Bank*, 33 Pa. 134. But see note 14 to preceding section.

⁸ *Johnson v. Crane*, 16 N. H. 68.

by an indorser or a drawer of demand and notice.¹ This waiver may arise either from a party's words or his acts.² A promise to give a note for the amount,³ or the giving of a note for the amount, by the indorser, being an acknowledgment of liability, is a waiver,⁴ provided it be done by one who has knowledge of his release. But there is some authority which might seem, but really is not,⁵ to the contrary; and certain rulings have been made which might seem to dispute the general rule. Thus, an admission after maturity of due service of protest did not bind the indorser as by a waiver apparently, for it was held that such an admission was *prima facie* evidence of notice of protest, rebutted as soon as it appeared that there was in fact no legal protest.⁶ But an agreement by an indorser to give security for his liability, although it was made after maturity, was not a waiver.⁷ This decision can be justified on the ground that there was no proof of the indorser's knowledge. The giving of security raises a presumption of waiver.⁸ If it were given with knowledge, that presumption becomes absolute. As soon as the fact appears, the burden is thrown on the indorser to show his lack of knowledge. Therefore the decision is wrong, for judgment on this question should have been for the plaintiff, the burden of proof being on the defendant. The offer to indorse another note was not a waiver, because it was not perhaps an unconditional admission of liability.⁹ Nor can an offer of payment in depreciated bank bills,¹⁰ or in Confed-

¹ Bogart v. McClung, 11 Heisk. 105; Leonard v. Gary, 10 Wend. 504; Oglesby v. Stacy, 10 La. Ann. 117 (after suit brought); Parsons v. Dickinson, 23 Mich. 56.

² Staylor v. Ball, 24 Md. 183; Parsons v. Dickinson, 23 Mich. 56.

³ Fell v. Dial, 14 S. C. 247. This could be considered, perhaps, as a new promise.

⁴ Leonard v. Hastings, 9 Cal. 236 (made with knowledge, possibly).

⁵ See the cases following.

⁶ Todd v. Neal, 49 Ala. 266. And see Newberry v. Trowbridge, 13 Mich. 263 (wrong).

⁷ Carter v. Burley, 9 N. H. 558.

⁸ Union Bank v. Govan, 10 Smedes & M. 333.

⁹ Laporte v. Landry, 5 Mart. (N. S.) 359, 4 Mart. (N. S.) 125. But this is a questionable ruling.

¹⁰ Newberry v. Trowbridge, 13 Mich. 263. Or in Confederate money. Tardy v. Boyd, 26 Grät. 631.

erate money,¹¹ be considered a waiver, since neither acknowledgment is unqualified. An offer to pay part of the note at the time of the offer and a part later raised no presumption of waiver.¹² On the other hand, an admission of the justice of the claim, even after suit brought,¹³ and a statement by the indorser to the holder that he expected to have to pay, coupled with a request for the holder to keep on trying to collect from the maker,¹⁴ were both held to be waivers. In all cases of acknowledgments which are not new promises after maturity, or partial payments after maturity, or express waivers after maturity, it is the rule that, if made with full knowledge, the admission becomes absolute.¹⁵ The acknowledgment alone appearing, the defendant indorser may rebut the *prima facie* case by proof of his lack of knowledge, or by showing that the admission was a mistake.¹⁶

ARTICLE VI.—PROTEST AND CERTIFICATE.

§ 305. **Meaning and form of protest.**—The word “protest” as used by judges and lawyers has two meanings: one, those acts necessary to charge a drawer or indorser;¹ the other, the formal certificate drawn up by a notary or some one acting in place of a notary, which shows the demand and dishonor with the accompanying proof of notice, if any.² The form and sufficiency of the certificate of protest is necessarily governed by the law of the place where the protest is made.³ The admissibility of the certificate in evidence

¹¹ See the last case cited.

¹² *Barkalow v. Johnson*, 16 N. J. Law, 397.

¹³ *Oglesby v. Stacy*, 10 La. Ann. 117.

¹⁴ *Parsons v. Dickinson*, 23 Mich. 56.

¹⁵ The preceding cases treat the matter in this light.

¹⁶ A mistaken admission may be corrected. *Commercial Bank v. Clark*, 28 Vt. 325.

¹ *White v. Keith*, 97 Ala. 668; *Ayrault v. Pacific Bank*, 47 N. Y. 570.

² *Townsend v. Lorain Bank*, 2 Ohio St. 345.

³ *Neederer v. Barber*, Fed. Cas. No. 10,079; *Tickner v. Roberts*, 11 La. 114; *Carter v. Burley*, 9 N. H. 558; *Chew v. Read*, 11 Smedes & M. 182; *Dwight v. Richardson*, 12 Smedes & M. 325.

is governed, however, by the law of the place of trial of the action.⁴ In the certificate the paper protested must be intelligibly described.⁵

§ 306. Execution of the certificate.—The certificate should be made by a notary¹ or by some one who has notarial powers; it may be a justice of the peace,² or, where there is no notary, by a private person in the presence of witnesses.³ The certificate need not be under seal⁴ unless the statute require it.⁵ It need not be under oath unless the statute so provide.⁶ In some jurisdictions it must be witnessed,⁷ but the witnesses need not be present at the act of protest.⁸ The notices need not be actually annexed to the certificate by the notary.⁹ The certificate may be drawn up in due course of business,¹⁰ some authorities requiring it to be done on the same day.¹¹ A second certificate may be made if the first is lost.¹² The original protest may be issued. The certificate need not appear to be a transcript from some record,¹³ unless the statute require a record.

⁴ See § 307, *post*.

⁵ *Lionberger v. Meyer*, 12 Mo. App. 575; *Fulton v. Maccracken*, 18 Md. 528; *Collins v. Bank*, 4 Baxt. 422.

¹ See §§ 247, 278, *ante*, as to the notary's deputy or clerk.

² *Austin v. Miller*, 5 McLean, 153.

³ See § 246, *ante*.

⁴ *Lambeth v. Caldwell*, 1 Rob. (La.) 61; *Bank of Kentucky v. Pursley*, 3 T. B. Mon. 238; *Second Nat. Bank v. Chancellor*, 9 W. Va. 69. See *Morris v. Foreman*, 1 Dall. 193.

⁵ *Rindskoff v. Malone*, 9 Iowa, 540. A statute may require the certificate to be verified. See *Dorsey v. Merritt*, 6 How. (Miss.) 390; *Faulkner v. Faulkner*, 73 Mo. 327.

⁶ See last two cases cited.

⁷ *Allain v. Whitaker*, 5 Mart. (N. S.) 511; *Gale v. Kemper*, 10 La. 205.

⁸ *Bradford v. Cooper*, 1 La. Ann. 325, and cases in last case of last note cited.

⁹ *Jones v. Berryhill*, 25 Iowa, 289; *Barstow v. Hiriart*, 6 La. Ann. 98. See *Jordan v. Long*, 109 Ala. 414, and *Winchester v. Winchester*, 4 Humph. 51.

¹⁰ *Bailey v. Dozier*, 6 How. 23; *Chatam Bank v. Allison*, 15 Iowa, 357.

¹¹ *Aiken v. Cathcart*, 2 Spears, 642; *Commercial Bank v. Barksdale*, 36 Mo. 563.

¹² *Killam v. McKoon*, 31 Hun, 519.

¹³ *Starr v. Sandford*, 45 Pa. 193.

§ 307. **Certificate as evidence.**—A certificate of protest by a notary upon foreign bills proves a demand of payment and notice, if it so recites;¹ but if the protest certificate is made by some other officer than a notary, his authority to protest must be proven as a fact under the foreign law.² The allowance of such proof by certificate upon foreign protest exists by virtue of the law merchant, and foreign protest can be proven in no other way.³ But there are numerous statutes of various states which permit protest of other paper than foreign bills, and there are various statutes which prescribe the effect of such protest as evidence. These statutes may be: 1st. A statute which allows within the particular state the protest of other paper than foreign bills and makes the certificate thereof evidence either of demand or of notice and demand. Such a statute, it is plain, would have no bearing upon paper protested out of the state, and would have no bearing upon the admissibility of a certificate made out of the state.⁴ 2d. A statute may make all protests in another jurisdiction admissible in evidence when made upon paper not properly protestable by a notary.⁵ In such case it makes no difference whether the law of the other jurisdiction where the protest was made provides for such protest or not.⁶ 3d. A statute in the jurisdiction where the protest is made may provide for protest upon paper other than foreign bills, but the protest may be offered in evidence in another state where there is no statute which makes the certificate evidence. In the latter case, since the protest is valid where made, according to the principle hereinbefore stated,⁷ the

¹ *Dickens v. Beal*, 10 Pet. 572;
Pierce v. Indseth, 106 U. S. 546.

² So of a French huissier. *Chanoine v. Fowler*, 3 Wend. 173.

³ See § 246, *ante*, note 1.

⁴ *White v. Engelhard*, 2 Smedes & M. 38; *Sims v. Hundley*, 6 How. 1. Such a statute would not make good a certificate of a state notary acting outside of his state. *Dutchess Co. Bank v. Ibbotson*, 5 Denio, 110.

⁵ *Rushworth v. Moore*, 26 N. H. 188; *Dakin v. Graves*, 48 N. H. 45; *Daniel v. Downing*, 26 Ohio St. 578; *Douglas v. Bank of Commerce*, 97 Tenn. 133; *Bradley v. Northern Bank*, 60 Ala. 252.

⁶ *Union Bank v. Middlebrook*, 33 Conn. 95; *Kern v. Von Phul*, 7 Minn. 426.

⁷ *Townsley v. Sumrall*, 2 Pet. 170.

certificate ought to be admissible in evidence when supplemented with proof of the foreign law, if the paper was payable where protested,⁸ but this position is apparently denied in other courts; no reason is given, but it must be for the reason that no sovereignty can prescribe rules of evidence for another one's courts.⁹ If the certificate is admissible it needs no proof of its execution; it proves itself.¹⁰ And this is true both of protest on a foreign bill and of protest permitted by a statute. If the notary be dead, the books of the notary,¹¹ or certified extracts from them made by competent authority,¹² are in all cases admissible to prove the notary's demand and notice, provided the notary made the entries himself, and they were not made by some one who is alive.¹³ A statute, also, on this subject exists in some jurisdictions.¹⁴

§ 308. **Recitals of certificate.**—The certificate to be sufficient as proof of demand and notice should state in some way that a demand was made, that payment was refused, and that notice of non-payment was given.¹ The fact of demand should be stated, but the certificate need not state the hour.² If it states that demand was made at a place of busi-

⁸ *Carruth v. Walker*, 8 Wis. 252; *Lawson v. Pinckney*, 40 N. Y. Super. Ct. 187. See *Teconic Bank v. Stackpole*, 41 Me. 302; *Carter v. Burley*, 9 N. H. 558. Both these cases treat a promissory note indorsed in another state as a foreign bill. *Dunn v. Adams*, 1 Ala. 527, *semble*.

⁹ *Corbin v. Planters' Bank*, 87 Va. 661; *Etting v. Schuylkill Bank*, 2 Pa. 355; *Schoneman v. Fegley*, 7 Pa. 433. See *Union Bank v. Hyde*, 6 Wheat. 572; *McAllister v. Smith*, 17 Ill. 328; *Sumner v. Bowen*, 2 Wis. 524. The certificate can be used as a memorandum by the notary as a witness. *Bernard v. Barry*, 1 G. Greene, 388.

¹⁰ *Harrison v. Brown*, 16 La. 282; *Dickens v. Beal*, 10 Pet. 572; *Shanklin v. Cooper*, 8 Blackf. 41.

¹¹ *Austin v. Wilson*, 24 Vt. 630; *Nichols v. Webb*, 8 Wheat. 326; *Bank of Wilmington v. Cooper*, 1 Har. 10.

¹² *Portas v. Painboeuf*, 1 Mart. (O. S.) 267; *Halliday v. Martinet*, 20 Johns. 168 (sworn copy); *Homes v. Smith*, 16 Me. 181; *Bodley v. Scarborough*, 5 How. (Miss.) 729. *Contra*, *Williamson v. Patterson*, 2 McCord, 132.

¹³ *Wilber v. Selden*, 6 Cow. 162.

¹⁴ *McKnight v. Lewis*, 5 Barb. 681.

¹ *Crowley v. Barry*, 4 Gill, 194; *Gardner v. Bank of West Tennessee*, 1 Swan, 419; *Langley v. Palmer*, 30 Me. 467.

² The certificate should show presentment to the proper person (*Duckert v. Von Lilienthal*, 11 Wis. 56), or presentment at his residence

ness it will be presumed to have been during business hours.³ If it states that a demand was made at a bank, for example, it need not state upon what officer it was made.⁴ But a demand upon a partnership made upon one partner must show the names of the partners, and the name of the particular partner upon whom the demand was made.⁵ If the person upon whom demand is made has more than one place of business, the certificate should state at which place the demand was made, if the paper was payable at a particular one of the two places.⁶ If the demand is stated to be made upon some one for the maker or drawee, the place of making the demand ought to be stated, in order to show the demand was at a proper place.⁷ If the certificate states a presentment, it will be presumed that the demand was in accordance with the tenor of the paper.⁸ The certificate may state along with the usual statements all that transpired at the demand,⁹ and it has been held that if payment was refused the reason given for refusal should be stated.¹⁰ It must ap-

or place of business. See notes 4 and 12, *infra*. It is said that the certificate should show a presentment of the paper (Musson v. Lake, 4 How. 262); but the better rule is that the fact stated as to the paper being in his possession is sufficient (Warren v. Briscoe, 12 La. 472; Union Bank v. Fowlkes, 2 Sneed, 555; Nailor v. Bowie, 3 Md. 251); and even this is not required. Ross v. Bedell, 5 Duer, 462; Bank of La. v. Satterfield, 14 La. Ann. 80. In case of paper payable at a bank, it is enough to say that the paper was at the bank. Seneca Co. Bank v. Neass, 5 Denio, 329; Barbaroux v. Waters, 3 Met. (Ky.) 304 (not necessary); Cayuga Co. Bank v. Hunt, 2 Hill, 635; Adams v. Wright, 14 Wis. 408, as to the hour.

³ Bank of Louisiana v. Satterfield, 14 La. Ann. 80; Fleming v. Fulton,

6 How. (Miss.) 473; De Wolf v. Murray, 2 Sandf. 166.

⁴ Hildeburn v. Turner, 5 How. 69. See Stix v. Matthews, 75 Mo. 96. The certificate need not state the name of the bookkeeper to whom presented at the maker's counting room. Austin v. Latham, 19 La. 88. And see McFarland v. Pico, 8 Cal. 626.

⁵ Otsego Co. Bank v. Warren, 18 Barb. 291.

⁶ Brooks v. Higby, 11 Hun, 235.

⁷ Saul v. Brand, 1 La. Ann. 95.

⁸ Dakin v. Graves, 48 N. H. 45.

⁹ Reapers' Bank v. Willard, 24 Ill. 439.

¹⁰ Dupre v. Richard, 11 Rob. (La.) 495. This is certainly not the law. A mere statement of payment refused is sufficient. See note 1,

supra.

pear that the demand was made on the right day¹¹ and at the proper place,¹² but misnomers as to a name or a place of business will not vitiate the certificate. The certificate as proof of notice should recite the fact of giving notice.¹³ In stating the giving of notice the certificate should state the day of giving personal notice and the place.¹⁴ It is enough to state that the notice was left at the place of business of the person to be charged,¹⁵ and it need not state with whom it was left.¹⁶ In case of notice by mail, the place of address of the notice sent,¹⁷ and that it was the postoffice of the person to be charged.¹⁸ The burden is then upon the other party to show that the place was not his postoffice,¹⁹ and in rebuttal thereto the notary should show due diligence. The day of giving of notice but not the date of the letter need be given.²⁰ The postoffice at which the notice was mailed should be stated,²¹ and the notice should show that the mailing or the giving of notice was in proper time.²² The certificate need not state that postage was prepaid upon a

¹¹ *Walmsley v. Acton*, 44 Barb. 312; *Nailor v. Bowie*, 3 Md. 251.

¹² At residence is sufficient. *Man-due v. Kitchin*, 3 Rob. (La.) 261; *Louisiana State Bank v. Dumar-trait*, 4 La. Ann. 483. At office. *Curry v. Bank of Mobile*, 8 Port. 360. See *Coster v. Thomason*, 19 Ala. 717. Misnomers as to name of bank. *Worley v. Waldron*, 3 Sneed, 548; *Whittington v. Farmers' Bank*, 5 Har. & J. 489; *Stix v. Matthews*, 75 Mo. 96. Other misnomers see *Reid v. Reid*, 11 Tex. 585; *Branch Bank v. Rhodes*, 11 Ala. 283. The location of the bank need not be stated. *Thatcher v. Goff*, 13 La. 360.

¹³ If it is silent upon the point of notice it proves simply the demand.

¹⁴ *Palmer v. Lee*, 7 Rob. (La.) 537; *Knox v. Buhler*, 6 La. Ann. 104, as

to the day both for personal and mail notice.

¹⁵ *Gardner v. Bank of Tennessee*, 1 Swan, 420; and see note 3, *supra*.

¹⁶ See note 4, *supra*, as to demand.

¹⁷ *Curry v. Bank of Mobile*, 8 Port. 360.

¹⁸ *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528. But see *Legg v. Vinal*, 165 Mass. 555.

¹⁹ *Wamsley v. Rivers*, 34 Iowa, 463. It need not be stated that it was the nearest postoffice. *Gas Bank v. Desha*, 19 La. 459. But *contra*, *Rogers v. Jackson*, 19 Wend. 383. See *Barber v. Ketchum*, 7 Hill, 444.

²⁰ *Palmer v. Lee*, 7 Rob. (La.) 537; *Knox v. Buhler*, 6 La. Ann. 104.

²¹ *Pritchard v. Hamilton*, 6 Mart. (N. S.) 457.

²² *Menard v. Winthrop*, 2 La. Ann. 333 (wrong).

letter,²³ and if it states a mailing the prepayment of postage will be presumed.²⁴ But if the certificate states without giving any particulars that the person was notified or duly notified, it will be sufficient as stating a fact,²⁵ unless a statute requires a more particular statement.²⁶ If due diligence is relied upon as an excuse for a failure to demand or notify, the facts constituting the diligence should be set forth.²⁷ Whatever would be evidence of proper notification if stated by a witness upon the stand would be evidence of notice when stated in a certificate;²⁸ therefore the rules stated in the previous sections upon notice²⁹ and upon demand would hold good here.³⁰

§ 309. Facts of which certificate is evidence.—The certificate of protest, where it is admissible as evidence, either under the general law or by reason of a statute, is competent to prove demand, refusal of payment, and notice.¹ The certificate, therefore, ought to be competent proof of all facts connected with and a part of the demand and giving of notice. Thus, the recital that the paper was presented at or

²³ *Pier v. Heinrichshofen*, 6 Cent. L. J. 285.

²⁴ *Brooks v. Day*, 11 Iowa, 46.

²⁵ *Orons Bank v. Wood*, 49 Me. 26; *Bettis v. Schrieber*, 31 Minn. 329; *O'Niel v. Dickson*, 11 Ind. 253; *Roberts v. State Bank*, 9 Port. 312; *Fuller v. Dingman*, 41 Iowa, 506; *Case v. Getchell*, 21 Pa. 503; *Seneca Co. Bank v. Neass*, 3 N. Y. 442; *Simpson v. White*, 40 N. H. 540. *Contra*, *Bank of Alexandria v. Wilson*, 2 Cranch, C. C. 5; *Union Bank v. Humphreys*, 48 Me. 172.

²⁶ See *Burk v. Shreve*, 39 N. J. L. 214.

²⁷ *Baumgardner v. Rieves*, 35 Pa. 250. See *Nailor v. Bowie*, 4 Md. 290 (this case is wrong as to the contents of the notice).

²⁸ See *Saul v. Brand*, 1 La. Ann. 95. But this case is wrong in stating

the converse of the rule given above, for the great weight of authority is that conclusions may be stated in a certificate. But the courts of Louisiana, Tennessee and Maryland hold the contrary. See *Reier v. Strauss*, 54 Md. 278; *Cockrill v. Lowenstine*, 9 Heisk. 206.

²⁹ See § 269, *ante*, et seq.

³⁰ See § 245, *ante*, et seq.

¹ *Nichols v. Webb*, 8 Wheat. 326. While this case states the rule as to a deceased notary's notice on paper not protestable, it shows that the rule is the same on paper properly protestable. *Townsley v. Sumrall*, 2 Pet. 170; *Sims v. Hundley*, 6 How. 1; *Brandon v. Loftus*, 4 How. 127. The learned Justice Catron in this case talks about "fixing an indorser."

notice sent to the place of business or residence of an indorser or drawer is competent proof of the fact of residence, and is *prima facie* sufficient.² So it is of the fact as to whom the paper is presented and of his relation to the indorser,³ and as to the time,⁴ and of the reasons for not making a personal demand,⁵ such as that the person was absent or that the office was closed. But the certificate is not proof of collateral facts stated therein, such as that the person upon whom the demand was made or notice served was an agent of the person who should have received the demand or the notice;⁶ nor are the statements of hearsay contained in the certificate proof of anything more than that such statements were made; they are, of course, not sufficient to prove the truth of the matters of fact stated by way of hearsay.⁷

§ 310. Conclusiveness of the certificate.—The certificate, whether it be of a protest of domestic paper made evidence by statute or a foreign protest, is not conclusive, but it is *prima facie* evidence.¹ The statements contained therein may be contradicted, whether as to the fact of demand or the recitals of demand or notice contained in the certificate,² but the evidence to contradict must be legally

² Bell v. Lunt, 24 Wend. 230.

³ Elliot v. White, 51 N. C. 98. But see note 6, *infra*.

⁴ See the preceding section.

⁵ See note 27 to preceding section, and Bell v. Lunt, 24 Wend. 230. But see Reier v. Strauss, 54 Md. 278, and Weems v. Bank of Maryland, 15 Md. 231.

⁶ Coleman v. Smith, 26 Pa. 255; O'Connel v. Walker, 1 Port. 263; Fortin v. Field, 17 La. 587. Compare Elliot v. White, 51 N. C. 98.

⁷ Dumont v. Pope, 7 Blackf. 367; Moore v. Worthington, 2 Duv. 307; Adams v. Wright, 14 Wis. 408; Maccoun v. Atchafalaya Bank, 13 La. 342. See Gage v. Dubuque R. Co., 11 Iowa, 310.

¹ Nichols v. Webb, 8 Wheat. 326; Gordon v. Price, 10 Ind. 385 (under statute); Cockrill v. Lowenstine, 9 Heisk. 206.

² See cases in last note and Spence v. Crockett, 5 Baxt. 576; Adams v. Wright, 14 Wis. 408; Orono Bank v. Wood, 49 Me. 26; Kellogg v. Pacific Box Factory, 57 Cal. 327; Applegarth v. Aybott, 64 Cal. 459; Sather v. Rogers, 10 Iowa, 231. The certificate, it seems, may be impeached by particular or general malpractice of the notary. Wood v. Am. Ins. Co., 7 How. (Miss.) 609; Seltzer v. Fuller, 6 Smedes & M. 185. As to evidence see Buckley v. Seymour, 30 La. Ann. 1341; Young v. Pattison, 11 Rob. (La.) 7; Fales

sufficient for that purpose; for, as we have seen, the fact, standing alone, that notice was not received has no tendency to contradict the fact that it was mailed.³ But it has been held that the notary himself cannot impeach his own certificate,⁴ and it has been held that he can. The certificate of protest upon a foreign bill of exchange is necessary, and the certificate, while it may be contradicted, cannot be added to or helped out by parol evidence.⁵ But upon domestic paper the statutes permitting protest are permissive, not compulsory.⁶ So the certificate of protest upon domestic paper not only may be contradicted, but may be added to, explained or assisted by parol evidence.⁷ Whatever facts the certificate fails to state may be added by the oral testimony of any witness competent and able to testify upon the point.⁸

v. Wadsworth, 23 Me. 553; Caruthers v. Harbert, 5 Cold. 362.

³ Wilson v. Richards, 28 Minn. 337; Roberts v. Wold, 61 Minn. 291. *Contra*, Townsend v. Auld, 31 N. Y. Supp. 29. The court's statement is really *dictum*. There was evidence to show that the notice was never deposited in the postoffice. See also Young v. Pattison, 11 Rob. (La.) 7.

⁴ Garthwaite v. Seipe, 23 La. Ann. 218. *Contra*, Adams v. Wright, 14 Wis. 408.

⁵ Ocean Nat. Bank v. Williams, 102 Mass. 141; Carter v. Union Bank, 7 Humph. 548.

⁶ See cases in note 1, *supra*.

⁷ Dickerson v. Turner, 12 Ind. 223; Applegarth v. Aybott, 64 Cal. 459.

⁸ Saul v. Brand, 1 La. Ann. 95. See Morris v. Foreman, 1 Dall. 193.

CHAPTER XI.

CIRCULATING NOTES.

§ 311. **Power to issue circulating notes.**— The power to issue bank-notes by an incorporated bank must always be a question of statute. In the case of a private banker it must always be an inquiry as to a statutory prohibition. As to a corporation it is a question of grant of power, although the want of a grant is to be inferred either from a failure to grant the power or a prohibition against its exercise. Certificates of deposit are not forbidden by the prohibition of the issuance of bank-notes,¹ nor a time certificate of deposit forbidden by a prohibition directed against post-notes.² A bank must have an existence in order to make a contract, and hence the bills of an unconstitutional bank are void.³ A banking corporation with general banking powers may issue bank-notes or post-notes,⁴ but the power to receive deposits and give acknowledgments therefor does not authorize the issuance of certificates to circulate as money.⁵ An insurance company,⁶ or a canal company,⁷ or a loan com-

¹ Talladega Ins. Co. v. Landers, 43 Ala. 115; Hargroves v. Chambers, 30 Ga. 580. Compare Mumford v. American Life Ins. Co., 4 N. Y. 463. But see In re Horner, 10 Leigh, 700.

² See notes 5 and 6 to § 125, *ante*. But compare National Life Ins. Co. v. Beebe, 7 N. Y. 364; Weed v. Snow, 3 McLean, 265.

³ Skinner v. Deming, 2 Ind. 558. See § 30, *ante*. While the bills might in this case be considered worthless, yet a remedy would exist against the corporators or those conducting the business. See § 30, *ante*.

⁴ Campbell v. Mississippi Bank, 6 How. (Miss.) 625. The power to issue notes is one of the ordinary functions of a bank; but if post-notes are forbidden they are void when issued. Swift v. Biers, 3 Denio, 70; Leavitt v. Blatchford, 3 N. Y. 19. So as to a post-dated draft. Oneida Bank v. Ontario Bank, 21 N. Y. 490.

⁵ Bliss v. Anderson, 31 Ala. 612. Compare People v. River Raisin Co., 12 Mich. 389.

⁶ In re Ohio Life Ins. Co., 9 Ohio, 291.

⁷ Lawler v. Walker, 18 Ohio, 151. But its bonds, although negotiable,

pany⁸ cannot issue bills, where such power is either not granted or forbidden to all except banks; but an army sutler seems to be able to issue currency in spite of law. But this might be called another case of the "war power," by one who had a sense of humor. At any rate he does not fall within the terms of the prohibition.⁹ Drafts issued by a bank to circulate as money are not unlawful unless expressly forbidden by a valid law;¹⁰ but under a prohibition against bills to circulate as money, which are not made payable in gold or silver, certificates payable in current bank-bills, and of course drafts or notes to circulate as money, payable in bills, are forbidden.¹¹ If forbidden to issue bills not for immediate circulation, a bank which issues its notes upon the understanding that they are not to be returned for a period violates the prohibition.¹² Municipal corporations have no power to issue bills to circulate as money, where all corporations except banking corporations are forbidden to do so, and it would seem even if there were no such prohibition.¹³ The state may incorporate a state bank and own all the stock¹⁴ and pledge the faith of the state to redeem the notes;¹⁵ and yet, as we are informed by the bench that decided the *Dred Scott* case, would not violate the prohibition of the Federal Constitution directed against the issuance by a state

are not forbidden. *McMasters v. Reed*, 1 Grant Cas. 36.

⁸ *Southern Loan Co. v. Morris*, 2 Pa. 175 (the bill was negotiable and unlawful).

⁹ *Weston v. Myers*, 33 Ill. 424 (the documents were due-bills purporting to call for so much money).

¹⁰ *King v. Dedham Bank*, 15 Mass. 447; *State v. Mathews*, 48 N. C. 451. But see as to checks, *Utica Ins. Co. v. Cadwell*, 3 Wend. 296.

¹¹ *Darden v. Banks*, 21 Ga. 297.

¹² *Commonwealth v. Bank of Mut. Redemption*, 86 Mass. 1.

¹³ *Thomas v. City of Richmond*, 12

Wall. 349; *Cothran v. City of Rome*, 77 Ga. 582. *Contra*, *Allegheny City v. McClurken*, 14 Pa. 81; *Devely v. Cedar Falls*, 27 Iowa, 227.

¹⁴ *Lampton v. Commonwealth Bank*, 2 Litt. 300; *Briscoe v. Bank of Commonwealth*, 11 Pet. 257; *Woodruff v. Trapnall*, 10 How. 190. *Contra*, *Bank of Commonwealth v. Clark*, 4 Mo. 59; *Linn v. State Bank*, 2 Ill. 87. These last two cases were right. See § 16, *ante*, note 5.

¹⁵ *Darrington v. State Bank*, 13 How. 12. This is perhaps the wildest decision ever made by that court.

of bills of credit.¹⁶ Two state decisions very properly held otherwise.¹⁷

§ 312. Statutory prohibitions.—Where there is a prohibition against the issuance of bank-notes, in order to show a violation of the act where the paper in itself is not a violation of the act, an intent to do so must be shown;¹ but the fact that the document did circulate as money is proof of its adaptation to that purpose.² Sometimes the statute is directed not against the issuance of such paper, but against the putting of it in circulation.³ But the issuance of orders upon a store payable in goods,⁴ whether issued by the store⁵ or by some one else,⁶ or tickets upon railroads good for one trip,⁷ or dray tickets,⁸ are not violations of such acts. But even though the note be issued unlawfully, it is proof of an indebtedness,⁹ but the notes themselves are no consideration for a contract.¹⁰ If the holder of such unlawful bills is *in pari delicto* with the bank or the person or corporation issuing the bill, there can be no recovery on the debt;¹¹ yet if there be a penalty imposed only on the person or corporation issuing the notes, the holder is not *in pari delicto* with the issuer.¹²

¹⁶ The bench that decided *Darrington v. State Bank*, *supra*, was practically the court that decided the *Dred Scott* case.

¹⁷ *Bank of Commonwealth v. Clark*, 4 Mo. 59; *Linn v. State Bank*, 2 Ill. 87.

¹ *State v. Humphreys*, 2 Dev. & B. 555. But a due-bill for money is a violation of the act in itself. *Hazleton Coal Co. v. Megargal*, 4 Pa. 324.

² *Barnett v. State*, 54 Ala. 579.

³ *Norvell v. State*, 50 Ala. 174; *Downing v. State*, 4 Mo. 572.

⁴ *Durr v. State*, 59 Ala. 24.

⁵ *United States v. Van Auken*, 96 U. S. 366.

⁶ *Durr v. State*, 59 Ala. 24.

⁷ *United States v. Monongahela Bridge Co.*, Fed. Cas. No. 15,796.

⁸ *State v. Teak*, 3 Sneed, 695.

⁹ *Parmley v. Tenth Ward Bank*, 3 Edw. Ch. 395.

¹⁰ *Skinner v. Deming*, 2 Ind. 558; *Bank of Commonwealth v. Clark*, 4 Mo. 59; *Pratt v. Adams*, 7 Paige, 615; *Doty v. Knox Co. Bank*, 16 Ohio St. 133; *Wilson v. Spencer*, 1 Rand. 76; *Hamtramck v. Selden*, 12 Grat. 28. See *Reznor v. Hatch*, 7 Ohio St. 248.

¹¹ *Thomas v. Richmond*, 12 Wall. 349; *Root v. Godard*, 3 McLean, 102. See §§ 27, 32, *ante*.

¹² *Atlas Bank v. Nahant Bank*, 3 Met. 581; *Buffalo City Bank v.*

§ 313. **State bank tax.**—The state bank tax applies to amounts paid out by the bank in its previously issued notes, as well as to payments in the notes of other banks.¹ But it applies only to notes payable in money.² Due-bills upon stores payable in goods or upon railroads payable in money are not taxable under it.³ Certificates of deposit nor drafts of one bank upon another, nor any other evidence of indebtedness not intended to circulate as money, would be subject to the tax. But there do not seem to have been any attempts to evade the tax by state banks, nor any attempt to put their paper into circulation.⁴ The pitiful attempts of the states by penalties imposed to compel state banks to maintain their notes at par⁵ or to pay specie for them⁶ are good illustrations of the utter worthlessness of the old state bank currency.

§ 314. **Payment of notes.**—A bank note is an engagement by the bank to pay bearer a certain amount of specie upon demand.¹ Being negotiable it passes by delivery; hence if it be lost the holder loses his cause of action, if the note passes to a *bona fide* holder.² But if a bank-note is lost

Codd, 25 N. Y. 163; Thomas v. Richmond, 12 Wall. 349, and cases therein cited.

¹ Deposit Sav. Ass'n v. Mayer, Fed. Cas. No. 3813.

² In re Aldrich, 16 Fed. R. 369.

³ United States v. White, 19 Fed. R. 723. Due-bills to railroad employees for wages, though used as money, are not taxable under this tax. Phila. R. R. Co. v. Pollock, 19 Fed. R. 401. And see United States v. Wilson, 106 U. S. 620.

⁴ A clearing-house being a voluntary association of banks, whether national or state, is a private institution. It issues certificates which are used as money. In fact in 1893 in New York city the banks would use nothing else for large sums.

These certificates are as a matter of law taxable under the state bank tax, but it is not likely that the law will be enforced. See §§ 366 and 367, *post*, for contrary decisions apparently.

⁵ Harrisburg Bank v. Commonwealth, 26 Pa. 451; Bank of Chambersburg v. Commonwealth, 2 Grant Cas. 384.

⁶ Bank of Kentucky v. Thornberry, 3 B. Mon. 519; Bryant v. Damariscotta Bank, 18 Me. 240; Brown v. Penobscot Bank, 8 Mass. 445; Wendell v. Washington Bank, 5 Cow. 161; State v. Banks, 12 Rich. Law, 609.

¹ Suffolk Bank v. Lincoln Bank, 3 Mason, 1.

² City Bank v. Farmers' Bank,

or stolen, the holder, like the holder of any negotiable paper, may recover from the bank, if the bank has not paid the note, upon giving indemnity.³ If the notes are destroyed, they may be sued for at law and a recovery had,⁴ without proof of a preliminary affidavit of loss,⁵ although such proof would have a bearing upon the question of interest.⁶ But a demand is necessary,⁷ at least to the recovery of interest.⁸ It was once a common practice to cut notes in two for safety in sending through the mail. If half of the note should be lost the holder was entitled to recover, certainly in equity, upon proof of loss and his ownership.⁹ Whether he was required to give security or not is questionable. Some courts held that half of a bank-note was not negotiable and hence no security was needed.¹⁰ Other courts held that in-

Fed. Cas. No. 2738. This has been the settled law ever since *Miller v. Race*, 1 Burr. 452.

³ *Waters v. Bank of Georgia*, R. M. Charl't. 193. But see *Hinsdale v. Orange Bank*, 6 Wend. 379. But where bank-notes are passing from hand to hand in the manner of national bank-notes, which are never presented for redemption, no recovery should be permitted. *Mobile Bank v. Meagher*, 33 Ala. 622. No such suit could be brought on account of the difficulties in the proof.

⁴ *Bank of Louisville v. Summers*, 14 B. Mon. 247; *Wade v. New Orleans Banking Co.*, 8 Rob. (La.) 140; *Hagerstown Bank v. Adams Exp. Co.*, 45 Pa. 419; *Ross v. Bank of Burlington*, 1 Aiken, 43. If it were proved that the notes were destroyed no indemnity was required. *Mobile Bank v. Meagher*, 33 Ala. 622; *Hagerstown Bank v. Adams Exp. Co.*, 45 Pa. 419. But if the proof were doubtful it was required. *Wade v. New Orleans Banking Co.*, 8 Rob. (La.) 140.

⁵ *Bank of Mobile v. Williams*, 13 Ala. 544. *Contra*, *Ross v. Bank of Burlington*, 1 Aiken, 43.

⁶ No liability to pay would arise until proof of loss to the bank. *Farmers' Bank v. Reynolds*, 4 Rand. 186.

⁷ *Streater v. Bank of Cape Fear*, 55 N. C. 31; *Ross v. Bank of Burlington*, 1 Aiken, 43. See § 316, *post*.

⁸ There is no default and hence no liability for interest.

⁹ *Allen v. State Bank*, 21 N. C. 1; *Bank of Virginia v. Ward*, 6 Munf. 166; *Armat v. Union Bank*, 2 Cranch, C. C. 180; *State Bank v. Aersten*, 4 Ill. 135; *Hinsdale v. Bank of Orange*, 6 Wend. 378; *Patton v. State Bank*, 2 Nott & McC. 464; *Union Bank v. Warren*, 4 Sneed, 167.

¹⁰ *Mobile Bank v. Meagher*, 33 Ala. 622; *United States Bank v. Sill*, 5 Conn. 106; *Murdock v. Union Bank*, 2 Rob. (La.) 112; *Hinsdale v. Orange Bank*, 6 Wend. 379. So held where the part of a note torn off

demnity was necessary and the remedy therefore in equity.¹¹ The fact that the bank had given notice that it would not pay the notes unless the whole note was produced would have no effect,¹² nor, it is conceived, would a law forbidding the mutilation of a note.¹³ But if the mutilation was fraudulently made, or for a fraudulent purpose, the bank could not be compelled to pay upon the production of part of a note.¹⁴ Worn-out notes are governed by the same rules.¹⁵ Forged notes upon a bank are adopted by the bank when it receives them without objection;¹⁶ but it cannot be made liable upon them when it merely receives them for examination,¹⁷ nor by the fact that it was negligent in the manner in which it kept its blank notes.¹⁸ Notes of a bank issued contrary to law bind it in the hands of *bona fide* holders.¹⁹ A bank in paying its own notes must pay specie. It cannot pay another bank presenting the notes and demanding specie in bills of the latter bank.²⁰ If it gives a draft for the notes the draft is not payment, unless it is made so by express agreement, and such an agreement is vitiated by fraud.²¹ But the bank may set off a debt of the holder to the bank.²² It must pay the face value of the notes to one who took the notes below par.²³ But the bank may pay the notes in legal

was not negotiable. *Martin v. Blydenburgh*, 1 Daly, 314.

¹¹ *Allen v. State Bank*, 1 Dev. & B. Eq. 3; *State Bank v. Ward*, 6 Munf. 166; *Commercial Bank v. Benedict*, 18 B. Mon. 307; and see note 9.

¹² *Martin v. Bank of U. S.*, 4 Wash. C. C. 253; *United States Bank v. Sill*, 5 Conn. 106.

¹³ This would be so unless the statute made the note void.

¹⁴ *Northern Bank v. Farmers' Bank*, 18 B. Mon. 506.

¹⁵ *Miner v. Bank of Louisiana*, 1 Mart. (O. S.) 20; *Note Holders v. Funding Board*, 84 Tenn. 46.

¹⁶ *Bank of U. S. v. Bank of Georgia*,

10 Wheat. 333; *Third Nat. Bank v. Allen*, 59 Mo. 310.

¹⁷ *Salem Bank v. Gloucester Bank*, 17 Mass. 1.

¹⁸ See last case.

¹⁹ *McDougald v. Bellamy*, 18 Ga. 411.

²⁰ *Suffolk Bank v. Lincoln Bank*, 3 Mason, 1. The rule would be different where a statute compelled the bank to take its own notes as a tender.

²¹ *Bank of St. Mary's v. St. John*, 25 Ala. 566.

²² *Long v. Farmers' Bank*, 1 Clark, 284.

²³ *Robinson v. Beall*, 26 Ga. 17; *Taylor v. Cook*, 14 Iowa, 500; *Dab-*

tender where they are not made payable in a particular medium of payment.²⁴ If foreign coin is tendered it may be taken by weight at its intrinsic value.²⁵ Silver coin of this country would not be a valid tender unless the silver were a legal tender;²⁶ but each note may be considered a separate debt as to payment in silver, where silver is a legal tender for a debt up to a certain amount.²⁷ Interest must be paid upon the notes from the date of a demand and a refusal of payment,²⁸ but, as to mutilated paper, proof of ownership must first be made.²⁹ A refusal to redeem may be inferred from an evasive and dilatory method resorted to by the bank for the purpose of delaying or harassing the holder.³⁰ Sometimes the state took upon itself the redemption of state bank notes out of deposited securities.³¹ In one

ney v. State Bank, 3 Rich. 124; Olmstead v. Winstead Bank, 32 Conn. 278. But see Collins v. Central Bank, 1 Kelly, 435.

²⁴ Treasury notes good payment. Reynolds v. State Bank, 18 Ind. 467; Metropolitan Bank v. Van Dyck, 27 N. Y. 400. These state decisions were in accord with the judgment that prevailed. Knox v. Lee, 12 Wall. 457, overruling Hepburn v. Griswold, 8 Wall. 603. The power to pass the legal tender act was originally justified as a war measure. But it is constitutional even in time of peace. Juilliard v. Greenman, 110 U. S. 421. But the best opinion on the subject, singularly enough, is found in a magazine article. See 1 Harv. Law Rev. 73, by Prof. Jas. B. Thayer.

²⁵ Suffolk Bank v. Lincoln Bank, 3 Mason, 1.

²⁶ Silver prior to 1853 was a legal tender. It is now. After 1873, for a time, it was a limited tender. Silver notes are not ~~more~~ legal tender by law; but treasury certificates for silver purchases are.

²⁷ Boatman's Sav. Inst. v. State Bank, 33 Mo. 497. The allegation of a tender of silver must allege it to be legal tender silver, where some coins are legal tender and others are not. State Bank v. Lockwood, 16 Ind. 306. And see Strong v. Farmers' Bank, 4 Mich. 350.

²⁸ Crawford v. Bank of Wilmington, 61 N. C. 136; Ringo v. Biscoe, 13 Ark. 563. But a suspension was held not to start interest. Bank of Louisiana v. Fowler, 10 Rob. (La.) 196. See also, *contra*, Attwood v. Bank of Chillicothe, 10 Ohio, 526, which states a better rule.

²⁹ Farmers' Bank v. Reynolds, 4 Rand. 186. The same rule as to preliminary proof would apply to lost or destroyed paper.

³⁰ People v. Whittemore, 4 Mich. 27; Reapers' Bank v. Millard, 24 Ill. 433. These two cases illustrate the state bank system in all its viciousness.

³¹ Willard v. Dubois, 29 Ill. 48; People v. Whittemore, 4 Mich. 27; People v. Holmes, 3 Mich. 544. The national government now redeems

instance the bank made a valid agreement with a third person to redeem its notes.³²

§ 315. **Stockholders' liability.**—If the association is unincorporated, each of the members of it is liable for all notes issued while he was a member.¹ This liability is not, it seems, varied by an express notice that the terms of the partnership are otherwise, nor by prior notice to all creditors that by becoming creditors they disavow any recourse upon the associates.² Stockholders in a corporation must be made liable for anything beyond their subscription by the charter or statute.³ If the liability be to the extent of the par value of the stock held by the stockholder, it is in proportion to the number of shares held,⁴ but if all the shares are not issued it will be in proportion to the issued shares.⁵ The liability arises whenever the bank refuses to pay its notes or is notoriously insolvent.⁶ A perpetual injunction against the bank's doing business dissolves the charter of the bank,⁷ but the liability survives the dissolution of the charter,⁸ and the liability extends in favor of those who took the bills after the expiration of the charter.⁹ There must first be an exhaustion of the assets, including the state deposit, of the bank,¹⁰

all national bank notes. From the destruction of national bank notes of the national banks that have failed, the government has made a handsome profit.

³² *Central Bank v. Empire Stone Co.*, 26 Barb. 23.

¹ *Riggs v. Swan*, 3 Cranch, C. C. 183.

² *Riggs v. Swan*, *supra*, and *Hess v. Werts*, 4 S. & R. 356, *semble*. See § 13, *ante*.

³ This must be understood in connection with §§ 48, 58, 59, 63 et seq., *ante*.

⁴ *Lane v. Harris*, 16 Ga. 217; *Adkins v. Thornton*, 19 Ga. 325; *Wiswell v. Starr*, 48 Me. 401. And see the sections *ante* cited in last note.

⁵ *Wiswell v. Starr*, 48 Me. 401. This question could not arise where the whole capital was required to be subscribed and paid in.

⁶ *Terry v. Tubman*, 92 U. S. 156; and see § 71, *ante*.

⁷ *Wiswell v. Starr*, 48 Me. 401; *Dane v. Young*, 61 Me. 160. This is sometimes a substitute for a judgment of dissolution.

⁸ *Thornton v. Lane*, 11 Ga. 459; *Robinson v. Lane*, 19 Ga. 337.

⁹ *Crease v. Babcock*, 10 Met. 525. But there is no liability for interest.

¹⁰ *Toucey v. Bowen*, 1 Biss. 81; *Crease v. Babcock*, 10 Met. 525. Under a different system, see *Hatch v. Burrows*, 1 Woods, 439. Sometimes the liability accrues upon in-

unless the bank is insolvent, but a return of *nulla bona* is said not to be conclusive against the stockholders.¹¹ But if the bill holder fails to present his claim to the bank receiver, he can recover from the stockholders only the amount remaining after deducting what he would have received had he presented his claim.¹² If stock is owned by the bank it does not increase the liability of the stockholders.¹³ The stockholders, unless made jointly liable by statute, are severally liable;¹⁴ and it was held in one state that a stockholder's voluntary redemption of notes was a payment of his liability *pro tanto*,¹⁵ but this cannot be correct.¹⁶ Where the directors are also made liable for the notes of the bank, the liability of the stockholders is not thereby made secondary to that of the directors.¹⁷ On the theory of a joint liability the release of a director was held to release the stockholders.¹⁸

§ 316. Remedies for refusal to pay notes.—The action against the bank upon its notes should be at law, and under a statute it may be for money had and received;¹ and the action for destroyed notes, where no indemnity is needed, is at law.² Where the action is against the stockholders, if at law, the first judgment creditor would obtain a preference,

solvency or dissolution. See § 62, *ante*.

¹¹ *Lane v. Harris*, 16 Ga. 217. But in almost every statutory system it is conclusive. See § 69, *ante*.

¹² *Grew v. Breed*, 10 Met. 569.

¹³ *Crease v. Babcock*, 10 Met. 525.

¹⁴ *Crease v. Babcock*, 10 Met. 525. See § 64, *ante*.

¹⁵ *Belcher v. Wilcox*, 40 Ga. 391; *Branch v. Baker*, 53 Ga. 502. But the general rule is otherwise. *Sacramento Bank v. Pacific Bank*, 56 Pac. R. 787. This ruling destroys the equality among the note holders.

¹⁶ See § 59, *ante*, note 10.

¹⁷ *McDougald v. Lane*, 18 Ga. 444.

¹⁸ *Robinson v. Bealle*, 20 Ga. 275.

This could not be the rule if the liability was several, and where the remedy can only be pursued in equity and no creditor can obtain a priority, it is difficult to see how such a release could be effective unless made by all the creditors. Most of the states have statutes, however, abolishing this rule as to joint debtors.

¹ *Goodenow v. Duffield*, Wright, 455; *Attwood v. Bank of Chillicothe*, 10 Ohio, 526. See *People v. New York C.P.*, 19 Wend. 113. The note-holders are not assignees in any sense of the term. *Wood v. Dummer*, 3 Mason, 308.

² *Bank of Mobile v. Meagher*, 33 Ala. 622.

but this action is generally in equity.³ There is no limitation upon the action while the notes are in circulation,⁴ but it has been unadvisedly said that after the notes have ceased to circulate the rule is different.⁵ The proper rule is that the statute should begin to run from a demand,⁶ and a failure of the bank dispenses with a demand;⁷ yet it is not sufficient to put the statute in motion.⁸ Where the notes are payable generally it is not necessary to allege a demand at the banking house or at all,⁹ although if they are payable at the banking house it is necessary to allege a demand there.¹⁰ Failure of the bank,¹¹ as just stated, or a state of war preventing a demand,¹² dispenses with the necessity. The proper party plaintiff is the owner of the bills, though he holds them as trustee,¹³ and the proper party defendant is the bank. If it be a suit to hold the stockholders, the proper parties must be determined according to the rules stated in a former section.¹⁴ In pleading upon the bank-notes it is not necessary to describe the notes by their numbers nor letters,¹⁵ nor dates, nor where payable,¹⁶ but they must be sufficiently described to show that the bank issued

³ Lowry v. Parsons, 52 Ga. 356. See §§ 67-69, *ante*.

⁴ Dougherty v. Western Bank, 13 Ga. 287; Long v. Bank of Yanceyville, 81 N. C. 41.

⁵ Kimbro v. Bank of Fulton, 49 Ga. 419. *Contra*, State v. Bank of Tennessee, 5 Baxt. 101. See Ballard v. Bell, 1 Mason, 252; Ballard v. Greenbush, 24 Me. 336; Solomons v. Bank of England, 13 East, 135.

⁶ Thurston v. Wolfborough Bank, 18 N. H. 391; Bank of Memphis v. White, 2 Sneed, 482.

⁷ Lane v. Morris, 8 Ga. 468. See as to certificates of deposit, § 169, *ante*.

⁸ See two cases in note 6, *supra*. *Contra*, Samples v. Bank, 1 Woods, 523, following the rule in Georgia.

⁹ State Bank v. Van Horn, 4 N. J.

Law, 382; Bryant v. Damariscotta Bank, 18 Me. 240; Haxton v. Bishop, 3 Wend. 13; Dougherty v. Western Bank, 13 Ga. 287.

¹⁰ Bank of Kentucky v. Hickey, 4 Litt. 225; Bank of Utica v. Magher, 18 Johns. 341.

¹¹ See note 7, *supra*, and Taylor v. Cook, 14 Iowa, 501.

¹² Hall v. Bank of Virginia, 14 W. Va. 584.

¹³ Grew v. Breed, 10 Met. 569. And the beneficiaries need not be joined.

¹⁴ See §§ 67-69, *ante*. And see Wilson v. Bank of Lexington, 72 N. C. 621.

¹⁵ Carey v. Greene, 7 Ga. 79.

¹⁶ Bank of Mobile v. Meagher, 33 Ala. 622.

them.¹⁷ If the notes are alleged to be destroyed it is doubtful whether such a description would be sufficient.¹⁸ Certainly in proof the contents should be proven by something more than the aggregate amount.¹⁹ Since the liability of the stockholders or directors, as engaged in the corporation, arises from the charter, it must be proven,²⁰ unless the court takes judicial notice of the existence of the charter.²¹ It is not a matter of defense against note-holders, either in pleading or proof, that the organization was not properly made by paying the capital stock in full, either on behalf of the bank or its stockholders.²² It has been said that if the note-holder took the notes with the agreement that they were not to be put into circulation, he cannot hold the stockholders,²³ but this conclusion is very properly denied.²⁴

¹⁷ *Irwin v. Planters' Bank*, 1 court say the corporation's existence was not proven.
Humph. 145.

¹⁸ The record would fail to show what notes were recovered upon. ²¹ This must be the case wherever the liability is created by statute,

¹⁹ *Bank of Mobile v. Meagher*, 33 Ala. 622. Circumstantial evidence of loss was held insufficient. *Tower v. Appleton Bank*, 85 Mass. 387. Unless the court in the particular jurisdiction refuses to take judicial notice of a private act.

²² *Johnston v. Southwestern Bank*, 3 Strob. Eq. 263.

²³ *Johnston v. Southwestern Bank*, last case. *supra*.

²⁰ *Gardner v. Post*, 43 Pa. 19. The ²⁴ *Grew v. Breed*, 10 Met. 569.

CHAPTER XII.

DISSOLUTION AND INSOLVENCY.

§ 317. **Surrender of charter.**—The charter having been granted by the state, it may be surrendered with the consent of the state,¹ but not without it.² This consent may be given by a special act³ or in accordance with a general law.⁴ The state may accept the surrender, but continue the corporation for a time for the purpose of settling its affairs,⁵ and during such time a cashier may be appointed⁶ and a commissioner for winding up its affairs may sue in the name of the corporation.⁷ The appointment of a receiver or of trustees does not dissolve the corporation.⁸ It may appoint officers,⁹ sue¹⁰ and be sued.¹¹ The corporation does

¹ *Savage v. Walshe*, 26 Ala. 619. There is often a general statute in accordance with which the bank may dissolve even by action of the directors. *People v. Olmstead*, 45 Barb. 644. Under the national bank act the two-thirds majority of the stockholders can dissolve against the wishes of the minority. *Watkins v. National Bank*, 51 Kan. 254.

² *Mechanics' Bank v. Heard*, 37 Ga. 401.

³ Many instances will be noticed in cases cited in this section.

⁴ See note 1, *supra*.

⁵ *Cooper v. Curtis*, 30 Me. 488. This is absolutely necessary to prevent the destruction of the rights of the corporation.

⁶ *Cooper v. Curtis*, *supra*.

⁷ *Commercial Bank v. Villavoso*, 6 La. Ann. 542.

⁸ *Merchants' Nat. Bank v. Gaslin*,

41 Minn. 552; *Central Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54; *Ahrens v. State Bank*, 3 S. C. 401. A bank is not dissolved although it has gone into voluntary liquidation, has transferred all its assets to another bank, which assumed its debts, and has given up its organization and its business. *Pritchard v. First Nat. Bank*, 76 N. W. R. 1106.

⁹ *Richards v. Attleborough Bank*, 148 Mass. 187.

¹⁰ See cases cited in note 8, *supra*.

¹¹ *Merchants' Nat. Bank v. Masonic Hall*, 65 Ga. 603. But if a receiver is appointed in Maine it is provided that the bank cannot be sued. *Leathers v. Shipbuilders' Bank*, 40 Me. 386. But the bank may sue. *American Bank v. Cooper*, 54 Me. 438. As to national banks, see § 334, *post*.

not cease to exist except by decree of dissolution,¹² or a statute having such effect,¹³ or by expiration of the charter.¹⁴ After such a dissolution the corporation ceases to exist; a judgment against it is void;¹⁵ any action taken in its name is nugatory,¹⁶ in the absence of a statute providing a different rule.

§ 318. Reorganization and consolidation.—A reorganization of a bank or consolidation of banks can take place only under statutory authority. The national bank act permits the reorganization of a state bank into a national bank.¹ The new national bank is the same corporation under another name.² The new bank may sue on a claim or prosecute an appeal of the old bank.³ The national bank is liable for all the liabilities of the state bank out of which it was reorganized.⁴ There is no closing of the business of a state bank under such a reorganization, so as to release it under a statute on bills not presented within six years.⁵ But the corporate existence of a former state bank ceases on the expiration of three years from its reorganization, its existence as a national bank having also expired.⁶ The liability on a continuing guaranty continues in favor of the new na-

¹² *National Bank v. Onondaga Co. Bank*, 7 Hun, 549.

¹³ Even where the statute dissolves the corporation the affairs thereof must be wound up under the direction of a court unless the act lodges that duty in certain persons.

¹⁴ This, of course, ends the corporate existence, unless it be continued for certain purposes.

¹⁵ *Hayden v. Bank of Syracuse*, 15 N. Y. Supp. 48; *Hodgson v. McKinstrey*, 3 Kan. App. 412. But there was no dissolution in this case.

¹⁶ *Bank of U. S. v. McLaughlin*, 2 Cranch, C. C. 20.

¹ See § 20, *ante*.

² *Coffey v. National Bank*, 46 Mo. 140.

³ *Atlantic Nat. Bank v. Harris*, 118 Mass. 147; *Claffin v. Farmers' Bank*, 54 Barb. 228.

⁴ *Kelsey v. National Bank*, 69 Pa. 426.

⁵ *Metropolitan Nat. Bank v. Claggett*, 141 U. S. 520, 125 N. Y. 729. It is not a payment for its stock. *Maynard v. Mechanics' Nat. Bank*, 1 Brewst. 483.

⁶ *Hayden v. Bank of Syracuse*, 15 N. Y. Supp. 48. See § 20, *ante*. But under 22 Stat. 167, § 7, a national bank does not cease to be able to sue and to be suable until its affairs are settled. *Farmers' Nat. Bank v. Backus*, 77 N. W. R. 142 (Minn.).

tional bank.⁷ The new bank is liable for the costs of a *scire facias*, although it was properly issued on a judgment in favor of the old bank in the name of that bank.⁸ But rights of the state over the bank, such as to require a payment of a bonus upon its business, cease upon reorganization.⁹ When a national bank is reorganized into a state bank, all property rights of the national bank pass to the new state bank,¹⁰ and when one national bank is reorganized into another national bank it is liable for deposits in the old bank,¹¹ and special deposits of bonds recognized by the payment of interest on the bonds by the bank become special deposits in the new bank.¹² In case of such a change, where the affairs of the former bank were liquidated, and all but one stockholder has taken part in the organization of the new bank, the omitted stockholder having accepted dividends from assets of the old bank cannot claim to be a stockholder in the new one.¹³ Similarly where a state savings association is reorganized into another state bank, those depositors who took stock in the new bank for their deposits and participated in the new bank are estopped from saying that their subscription to the stock of the new bank was conditional upon all the depositors taking stock in the new bank for their deposits.¹⁴ A defect in the reorganization under a new charter cannot be set up by a debtor to the old bank against his liability.¹⁵ If the reorganization consists in a liquidation of

⁷ *City Bank v. Philips*, 86 N. Y. 484.

⁸ *Thomas v. Farmers' Bank*, 46 Md. 43.

⁹ *State v. National Bank*, 33 Md. 75. The conversion of state into national banks was strongly opposed because the state derived a large benefit in some instances from those banks. Until the national banking law was supplemented by the state bank tax, there was little success in the national banking act.

¹⁰ *First Comm. Bank v. Talbert*, 103 Mich. 625.

¹¹ *Eaves v. Exchange Bank*, 79 Mo. 182.

¹² *First Nat. Bank v. Strang*, 28 Ill. App. 325.

¹³ *First Nat. Bank v. Marshall*, 26 Ill. App. 440.

¹⁴ *Dallemand v. Odd Fellows' Sav. Bank*, 74 Cal. 598.

¹⁵ *Spahr v. Farmers' Bank*, 94 Pa. 434. This was a case of an original usurious note taken up by renewals, which passed to the new bank. The indorser was not permitted to plead the usury of the old against the new bank.

the affairs of the old bank, even though the new bank with the same name as the old, and with generally the same stockholders, receives bills of the old bank and pays them out, the new bank does not become responsible for all the bills of the old bank,¹⁶ but simply those very notes which were received.¹⁷ A depositor in the old bank does not release it, unless he consents to the change.¹⁸ Nor does a corporation formed by the consolidation of a bank with another corporation, where trustees are appointed to wind up the affairs of the bank, become liable by the act of consolidation for the debts of the bank without some express assumption of the debts.¹⁹

§ 319. Forfeiture of charter.—The state has the right to forfeit a charter either for failure to observe the law in forming the corporation or for acts done in violation of law after the corporation is formed; thus, a failure to pay in the capital stock as required by law,¹ or any other failure to observe the provisions of the law governing the formation of the corporation. But the commoner grounds of forfeiture are those based upon acts done by the corporation after the formation thereof. But the act must be the act of the corporation. The unauthorized act of the cashier is no ground

¹⁶ *Bellows v. Hallowell Bank*, 2 Mason, 31.

¹⁷ *Wyman v. Hallowell Bank*, 14 Mass. 62. It is needless to say that these last two cases were not cases of a transformation of one bank into another bank. The change from one bank to another does not release the old corporation unless the creditor consents. *Ray v. Bank of Kentucky*, 10 Bush, 344.

¹⁸ See the last note.

¹⁹ *Donally v. Hearndon*, 41 W. Va. 519. If the statute or agreement imposes a liability on the new corporation, the rule is just the opposite. So it is if the new corporation receives assets of the old corpora-

tion without paying value therefor.

¹ *People v. City Bank*, 7 Colo. 226; *People v. Nat. Sav. Bank*, 129 Ill. 618. Compare *Commercial Bank v. State*, 6 Smedes & M. 599, which held that a failure to sell stock on account of non-payment of an instalment thereon was not a ground of forfeiture. Chief Justice Sharkey found himself in such an astonishing state of mental fog that he held that the state by suing the corporation in *quo warranto* for a forfeiture admitted the due and regular incorporation of the bank. This error was not indorsed by the other judges.

for forfeiture.² Nor do the acts as to which a discretion may be said to exist, such as the propriety of selling stock for a failure to pay assessments.³ The grounds of forfeiture will be as various as are the devices of men to escape statutory restrictions or their capabilities in the way of poor banking. But the corporation by abandoning its corporate franchises and surrendering its assets certainly incurs a liability for forfeiture.⁴ Such ground would be an assignment of all its effects for creditors,⁵ or the failure to hold an annual election of officers for five years.⁶ Its refusal to report its condition as required by the law,⁷ its suspension of specie payments continued for a long period, or absolutely and generally,⁸ but not a suspension for a short period;⁹ exchanging bills contrary to law;¹⁰ the making of unauthorized loans by

² State v. Commercial Bank, 5 Smedes & M. 218.

³ Commercial Bank v. State, 6 Smedes & M. 599.

⁴ State v. Seneca Co. Bank, 5 Ohio St. 171.

⁵ State v. Real Estate Bank, 5 Ark. 595; People v. Hudson Bank, 6 Cow. 217. But State v. Commercial Bank, 21 Miss. 569, holds that an assignment of all its property is not sufficient, and that the bank must reach such a condition that it cannot fulfill its purposes. Capital and assets seemed not to be necessary to a bank in those halcyon times "befo' the wah." This opinion is the joint effort of Chief Justice Sharkey and another judge. It is impliedly reversed in the next case cited.

⁶ State v. Commercial Bank, 33 Miss. 474.

⁷ State v. Seneca Co. Bank, 5 Ohio St. 171.

⁸ State v. Real Estate Bank, 5 Ark. 595; State v. Commercial Bank, 50 Ohio, 535; Commercial Bank v.

State, 6 Smedes & M. 599; State v. Bank of South Carolina, 1 Spears, 433; Planters' Bank v. State, 7 Smedes & M. 163. Compare State v. Louisiana Savings Co., 12 La. Ann. 568; and State v. Tombeckbee Bank, 2 Stew. 30, *is contra*. Under statutes. Bank of Circleville v. Iglehart, 6 McLean, 568; State v. New Orleans Gas Co., 2 Rob. (La.) 529; Lockhart v. U. S. Bank, 2 Ashm. 406; Atchafalaya Bank v. Dawson, 13 La. 497. Payment of legal tenders was, of course, not a ground of forfeiture. Reynolds v. Bank of State, 18 Ind. 467. A statute might require specie payments from a bank chartered before the statute was passed. Commercial Bank v. State, 6 Smedes & M. 599; but *contra*, State v. Tombeckbee Bank, 2 Stew. 30. But forfeiture statutes are not retroactive. People v. Niagara Bank, 6 Cow. 196.

⁹ State v. Comm. Bank, 10 Ohio, 535.

¹⁰ Bank Comm'rs v. Buffalo Bank, 6 Paige, 497.

the directors;¹¹ the contraction of debts or the issuance of bills to an amount greater than allowed by its charter;¹² the declaration of large dividends, while suspending specie payments, or the embezzlement of special deposits,¹³ have been held grounds for forfeiting the charter. Insolvency and a refusal to pay its debts, united with violations of its charter,¹⁴ or "gross and illegal" mismanagement under a statute,¹⁵ or without a statute, are sufficient grounds for forfeiture. Usurious agreements have been held to be no ground for forfeiture.¹⁶ Under the national banking act forfeitures are incurred by a violation of the various provisions of law applicable to the national banks.¹⁷ The act charged, whatever it may be, must be alleged, as to national banks, to have been done by the directors or with their knowledge.¹⁸ Statutes providing for forfeitures do not apply to acts done before their passage,¹⁹ but banks may be required to make their payments in specie, though chartered before the passage of the law.²⁰

§ 320. Waiver or remission of forfeiture.—Whenever a forfeiture has been incurred it may be remitted by the state by legislative act,¹ and it seems by borrowing money from the bank after a forfeiture has been incurred.² The forfeiture for insolvency is waived where the bank resumes

¹¹ See last case and *State v. Seneca Co. Bank*, 5 Ohio St. 171. But usurious loans were not ground for forfeiture. *State v. Comm. Bank*, 10 Ohio, 535. *Contra*, *Commonwealth v. Comm. Bank*, 28 Pa. 383.

¹² *State Bank v. State*, 1 Blackf. 270.

¹³ See last case.

¹⁴ *Attorney-General v. Oakland Co. Bank*, Walk. Ch. 90.

¹⁵ *Bank Comm'rs v. Central Bank*, 5 R. I. 12.

¹⁶ See note 10, *supra*.

¹⁷ See sec. 5239, Rev. Stat.

¹⁸ *Trenholm v. Comm. Nat. Bank*, 38 Fed. R. 323.

¹⁹ *People v. Niagara Bank*, 6 Cow. 196.

²⁰ See note 8, *supra*.

¹ *Bank of Missouri v. Bredow*, 31 Mo. 523; *Atchafalaya Bank v. Dawson*, 13 La. 497; *Nevitt v. Bank of Port Gibson*, 6 Smedes & M. 513; *State v. Bank of Charleston*, 2 McM. 439.

² *State v. Real Estate Bank*, 5 Ark. 595. This seems to be the species of estoppel noticed by the United States Supreme Court in the "sugar bounty" case.

payment before a suit is begun.³ A forfeiture is not waived by laches,⁴ but the limitation as to a suit for forfeiture in the case of a national bank is five years.⁵ The legislature may suspend proceedings already begun, and if the suspension of the proceeding is conditional, the bank by performing the condition has contracted with the state.⁶ The court itself, it has been held, may, in effect, waive the forfeiture by refusing, in its discretion, to enforce it.⁷

§ 321. Proceedings to forfeit.—The action to forfeit a charter is an action at law on behalf of the state in a direct proceeding for that purpose unless a different procedure is fixed by statute.¹ The proceeding is of a civil nature and is not a criminal proceeding.² The courts of equity have no power to dissolve a corporation,³ unless the power be given by statute.⁴ An ancillary injunction is sometimes permitted by statute,⁵ and in the nature of things, if the state could show sufficient grounds therefor, there is no reason why it should not have an injunction without a statute from a court

³ *People v. Niagara Bank*, 6 Cow. 196. *Contra*, *Comm. Bank v. State*, 6 Smedes & M. 599.

⁴ *People v. Bank of Pontiac*, 12 Mich. 527.

⁵ *Welles v. Graves*, 41 Fed. R. 459.

⁶ *Long v. Farmers' Bank*, 1 Clark, 284, 2 Pa. Law J. 230.

⁷ *Bank Commissioners v. Bank of Buffalo*, 6 Paige, 497.

¹ *Attorney-General v. Bank of Niagara*, Hopk. Ch. 354; *Murphy v. Farmers' Bank*, 20 Pa. 415; *State Bank v. Snelling*, 35 Mo. 190; *Huntington v. Crescent City Bank*, 18 La. Ann. 350. A court of equity has no such power except by statute. Such statutes sometimes make an injunction a dissolution of the charter. *Wiswell v. Starr*, 48 Me. 401; *Dane v. Young*, 61 Me. 160.

See *Commonwealth v. Bank of Mutual Redemption*, 86 Mass. 1.

² *Commercial Bank v. Rodney*, 4 Smedes & M. 439. Historically this is not true as to *quo warranto*, because a fine could be imposed as well as a judgment of ouster enforced. The proceeding was in the name of the sovereign in the nature of a writ of right superseded by information.

³ This is the general rule. There is but one case which directly holds otherwise, and that case is wholly unsound.

⁴ Such statutes are numerous. See note 1, *supra*; and see *Mitchell v. Bank of St. Paul*, 7 Minn. 252.

⁵ *Attorney-General v. Bank of Chenango*, Hopk. Ch. 596; *Commonwealth v. Bank of Mutual Redemption*, 86 Mass. 1.

of equity or from the same court, where the equitable and common-law jurisdictions are amalgamated.⁶ Sometimes the power to sue for a forfeiture is given to bank commissioners,⁷ but under one act it was held that the court on the application of the commissioners was given no power to appoint a receiver or to grant an injunction *ex parte* where the statute required a hearing.⁸ In other cases trustees or commissioners were nominated by acts of the legislature, but their powers were so various that it would serve no useful purpose to review these decisions.⁹

§ 322. Declaration of forfeiture.—There has been an instance where the statute itself has operated to declare the forfeiture;¹ but the forfeiture under statutes which define grounds for a forfeiture must be declared by a court.² Until that declaration no one can plead the forfeiture as against the bank.³ A decree finding the bank insolvent and appointing a receiver is not a declaration of forfeiture.⁴ The

⁶ This is a very old proceeding in chancery, and was originally brought by information. It would remain unless abolished. But *Attorney-General v. Bank of Niagara*, Hopk. Ch. 354, denies this on the authority of *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 371.

⁷ *People v. Superior Court*, 100 Cal. 105; *Bank Commissioners v. Central Bank*, 5 R. I. 112; *Bank Commissioners v. Bank of Buffalo*, 6 Paige, 497.

⁸ *Murray v. American Surety Co.*, 70 Fed. R. 341, 44 U. S. App. 43; *People's Sav. Bank v. Superior Court*, 103 Cal. 27.

⁹ See *Long v. Superior Court*, 102 Cal. 449; *Saltmarsh v. Planters' Bank*, 17 Ala. 761; *Jemison v. Planters' Bank*, 23 Ala. 168; *Savage v. Walshe*, 26 Ala. 619; *Atwood v. Caldwell*, 12 Ill. 96; *Morris v. Thomas*, 17 Ill. 112; *Miners' Bank*

v. Thomas, 4 G. Greene, 336; *Martin v. Belmont Bank*, 13 Ohio, 250.

¹ *Wilson v. Tisson*, 12 Ind. 285. See *United States v. Church*, 5 Utah, 361.

² *Atchafalaya Bank v. Dawson*, 13 La. 497; *Huntsville Bank v. McGeehee*, 1 Stew. & P. 306; *City Ins. Co. v. Commercial Bank*, 68 Ill. 348; *Union Bank v. McDonald*, 15 La. 25; *Bank of Louisiana v. Green*, 20 La. Ann. 214; *People v. Bank of Pontiac*, 12 Mich. 527; *Montgomery v. Merrill*, 18 Mich. 338.

³ *Hughes v. Bank of Somerset*, 5 Litt. 45; *Farmers' Bank v. Gasten*, 34 Mo. 119. *Contra*, *North Mo. River Bank v. Winkler*, 33 Mo. 354.

⁴ *Ahrens v. State Bank*, 3 S. C. 401; *Richards v. Attleborough*, 148 Mass. 187; *Central Bank v. Connecticut Life Ins. Co.*, 104 U. S. 54.

bank still has a corporate existence.⁵ So, under the national banking act, the appointment of a receiver does not dissolve the corporate franchises.⁶ Suits pending against the bank are not affected by the appointment, except that the receiver may be substituted.⁷ The bank may be sued in spite of the appointment of the receiver.⁸

§ 323. Effect of forfeiture or expiration of charter.—

When a charter has been duly declared forfeited, the bank has no longer any corporate existence. The bank only has such powers as are given to it by the statute.¹ It is exactly the same with the expiration of the charter or its repeal.² Unless the statute preserves some right, all debts owing to the bank are extinguished at law,³ and all suits pending against the bank are abated.⁴ But where the statute gives certain rights after forfeiture or expiration of the charter, the corporation may exercise them.⁵ Various statutory schemes of liquidating banks and various special acts have

⁵ It may be sued. *Merchants' Nat. Bank v. Gaslin*, 41 Minn. 552. See *National Bank v. Onondaga Co. Bank*, 7 Hun, 549. And see cases in last note.

⁶ *Nat. Pahquioque Bank v. First Nat. Bank*, 36 Conn. 325; *First Nat. Bank v. Nat. Pahquioque Bank*, 14 Wall. 383; *Chemical Nat. Bank v. Hartford Deposit Co.*, 161 U. S. 1; *Chemical Nat. Bank v. Hartford Deposit Co.*, 156 Ill. 522. The appointment supersedes the power of directors to carry on the bank.

⁷ See cases cited in last note and *American Bank v. Cooper*, 54 Me. 438.

⁸ See note 6, *supra*, as to national banks. But in Maine the bank cannot be sued after a receiver is appointed. *Leathers v. Shipbuilders' Bank*, 40 Me. 386.

¹ *Smith v. Frye*, 5 Cranch, C. C. 515; *Folger v. Chase*, 18 Pick. 63;

Saltmarsh v. Planters' Bank, 14 Ala. 668; *Wilson v. Tesson*, 12 Ind. 285; *Cunningham v. Clark*, 24 Ind. 7.

² *Pomeroy v. State Bank*, 1 Wall. 23; *Whitman v. Cox*, 23 Me. 335; *Merrill v. Suffolk*, 31 Me. 57; *Bank of Mississippi v. Duncan*, 56 Miss. 166; *Fox v. Horah*, 1 Ired. Eq. 358.

³ *Commercial Bank v. Chambers*, 8 Smedes & M. 9; *Coulter v. Robertson*, 24 Miss. 278.

⁴ *Bank of U. S. v. McLaughlin*, 2 Cranch, C. C. 20. But in case of national banks it is not so. *Bank of Montreal v. Fidelity Nat. Bank*, 1 N. Y. Supp. 852, 112 N. Y. 667.

⁵ It may defend a suit (*Pomeroy v. State Bank*, 1 Wall. 23), or assign paper (*Hallowell Bank v. Hamlin*, 14 Mass. 178). And see also *Cunningham v. Clark*, 24 Ind. 7; *Folger v. Chase*, 18 Pick. 63; *Smith v. Frye*, 5 Cranch, C. C. 515.

been passed.⁶ Trustees are sometimes appointed as required by the statutes.⁷ In the case of national banks a dissolution of the bank by a decree does not affect a pending action.⁸ But a judgment of forfeiture and appointment of trustees under a state statute vested the assets in the trustees.⁹

§ 324. Insolvency.—A bank is insolvent when it is unable to meet its obligations out of its assets in the due course of business.¹ A general suspension of specie payments, or notorious and continued inability to pay its debts, is insolvency,² but not necessarily a suspension in a sudden crisis.³ When a bank suspends or is insolvent, the assets are not so much a trust fund that the bank, where permitted to make such an assignment at all, cannot make an assignment with preferences.⁴ But an assignment for creditors or a suspension is proof of insolvency, or any other admission by the corporation of insolvency, even though the assets are sufficient to pay all the debts of the bank.⁵

§ 325. Assignments for creditors.—There is no doubt of the right of the directors of a bank to make assignments for creditors, unless such an act be forbidden by statute.¹

⁶ See cases cited in note 9 to § 321, *ante*.

⁷ See *People v. Ridgley*, 21 Ill. 65; *Commercial Bank v. Chambers*, 8 Smedes & M. 9. Unless a trustee or receiver be appointed within the time after dissolution by forfeiture the bank's claim is extinguished at law. *Conwell v. Pattison*, 28 Ind. 509. See *Bank of U. S. v. Leathers*, 8 B. Mon. 127.

⁸ *Bank of Montreal v. Fidelity Nat. Bank*, 1 N. Y. Supp. 852, 112 N. Y. 667. See also *McCann v. Rogers*, 15 Ky. Law R. 127. The receiver may be substituted as a matter of course.

⁹ *Nevitt v. Bank of Port Gibson*, 6 Smedes & M. 513.

¹ See §§ 85, 90, *ante*, and see *Harmanson v. Bain*, 1 Hughes, 188; *Exchange Bkg. Co. v. Mudge*, 6 Rob. (La.) 387.

² *Godfrey v. Terry*, 97 U. S. 171; *In re Empire City Bank*, 10 How. Pr. 498.

³ *Livingston v. Bank of New York*, 26 Barb. 304.

⁴ *Catlin v. Eagle Bank*, 6 Conn. 233.

⁵ *Dodge v. Mastin*, 17 Fed. R. 660; *State v. Mechanics' Bank*, 35 La. Ann. 562.

¹ *Union Bank v. Ellicott*, 6 Gill & J. 363; *Town v. Bank*, 2 Doug. 580; *Chew v. Ellingwood*, 86 Mo. 260; *Haxton v. Bishop*, 3 Wend. 13; *Farmers' Bank v. Willis*, 7 W. Va.

There is also no doubt of the bank's right to prefer creditors where such an act is not forbidden by statute.² Whether such preferences are valid or invalid in the absence of a prohibitory statute must depend upon the rule held in the particular jurisdiction as to such assignments. It is not our purpose to examine that question, nor the other question as to whether the assignment is void. But there are two cases peculiar to banking law which ought to be noticed. A bank on the eve of insolvency extended a debt owed by a stockholder by taking his notes due in two and three years, with the president of the bank as sole surety. The act was held to be fraudulent, and that the bank could proceed directly against the debtor in equity, without a judgment at law or a garnishment.³ This case is called one of preference, but it is really an act to hinder and delay creditors, and therefore a fraudulent conveyance. In another case it was held that a power given to the assignee to pledge the assets of the bank did not render the assignment fraudulent at law.⁴ Certainly, however, such a power would be void, whatever might be held as to the fraud in the assignment. Assuming, however, that the assignment is a valid one, a court will not take the assets from the assignee and give them to a receiver afterward appointed.⁵ The court, however, in the exercise of a chancery jurisdiction, might, if the receiver

31. But an assignment made after the appointment of a receiver, or proceedings therefor, is not good. *State v. Bank of New England*, 55 Minn. 139. But see, in Pennsylvania, *In re Banking Co.*, 12 Phila. 469.

² Preferences may be either expressly or impliedly forbidden. Compare *Dana v. Bank of U. S.*, 5 Watts & S. 223; *Bank Commissioners v. Bank of Brest*, Har. 106; *Shryock v. Bashore*, 11 Phila. 565; *Exchange Bank v. Knox*, 19 Grat. 739, *semble*; *Ex parte Conway*, 4 Ark. 302.

³ *Bank of St. Mary's v. St. John*, 25 Ala. 566.

⁴ *Montgomery v. Galbraith*, 11 Smedes & M. 555. The reservation of a surplus after paying creditors is lawful. *Dana v. Bank of U. S.*, 5 Watts & S. 223.

⁵ *Garden City Banking Co. v. Geilfuss*, 86 Wis. 616. Under some statutes the approval of the court is required for the assignee's appointment. See *Ex parte Banking Co.*, 34 Leg. Int. 204, 230, 12 Phila. 214, 469. When approved by the court, the receiver must turn over the assets to the assignee. *In re Union*

was appointed and the assignee an improper person, substitute the receiver for the assignee, even though the assignment was not held to be fraudulent. But if the assignment was made after the appointment of a receiver or notice of proceedings therefor, the assignment would not prevail.⁶ The assignment, when expressed to be general, will convey all property of the bank, though it be not mentioned in the schedule.⁷ It transfers all the property of the bank, though checks are outstanding against the deposits, whether accepted or unaccepted;⁸ but in those states which recognize the presentation of a check as a *sub modo* assignment, the situation is peculiar. The courts speak of the check presented, where funds are to the credit of the drawer, as an assignment of the money. If that were true, the money in the bank to the amount of the check belongs to the holder of the check. But even an accepted check only creates the relation of debtor and creditor between the bank and the check-holder in these very states. So the relation of debtor and creditor must exist between the bank and the check-holder after presentation. Therefore the bank's assignment would transfer the money in the bank against outstanding checks in those states which speak of the check as an assignment.⁹ Under the national bank act an assignment for

Banking Co., 12 Phila. 469. A stockholder may be assignee. Creditors may object, but cannot appoint. *News v. Shackamoxon Bank*, 16 Wkly. Notes Cas. 207.

⁶ *State v. Bank of New England*, 55 Minn. 139.

⁷ *Eppright v. Nickerson*, 78 Mo. 482. This is the general rule. This particular case is wrong in not admitting that the schedule is a part of the deed.

⁸ *Coates v. First Nat. Bank*, 91 N. Y. 20. This case was decided on the ground of an assignment, of which the check was considered merely a voucher. An accepted

check does not appropriate any particular portion of the assets or create a special deposit. See note 4 to § 163, *ante*.

⁹ This reduces the check to an assignment of a portion of a credit, or a partial assignment of a chose in action. This whole theory of the states spoken of above seems to be a case of what the biologists call reversion to an antecedent type, to the idea that a depositor has money in the bank. This idea is noticed in daily speech. Thus, under bequests of ready money or money on hand, credit in the bank passes. *Langdale v. Whitefield*, 27

creditors by a national bank is a vain proceeding, because the comptroller at once takes possession.

§ 326. **Preferences.**—A preference by a bank in an assignment for creditors is permissible, unless forbidden by law.¹ Such is the great weight of authority in spite of the protests of some courts and text writers. But preferences may be created by other means than an assignment for creditors general in its nature. Statutes are numerous which forbid any preference in contemplation of insolvency.² The national bank act has fixed the rule for national banks that all such preferences and all acts that amount to preferences are void. That act does not preserve the rights of *bona fide* transferees, but other acts do.³ There is no question under these statutes that any transfer to a transferee with or without notice of insolvency, if it be made by the bank with an intent to prefer, is absolutely void,⁴ and if void the assignee receives no title.⁵ Thus transfers to a director by the bank for his stock after he had heard rumors of insolvency are void;⁶ or transfers to a creditor not in the ordinary course of business, being notice to him from the nature of the transaction, are void.⁷ Payments to depositors or others, if made in the regular course of business to persons who have no

L. J. Ch. 795; *Stein v. Richardson*, 37 L. J. Ch. 369.

¹ *Ringo v. Trustees of Bank*, 13 Ark. 563; *Arthur v. Commercial Bank*, 9 Smedes & M. 394; *Catlin v. Eagle Bank*, 6 Conn. 233. See note 2 to § 325.

² See *Gillett v. Moody*, 3 N. Y. 479; *Leavitt v. Tyler*, 1 Sandf. Ch. 207; *Hill v. Western R. Co.*, 86 Ga. 284; *Exchange Bank v. Knox*, 19 Grat. 739.

³ See *Hill v. Western R. Co.*, 86 Ga. 284.

⁴ *Case v. Citizens' Bank*, 2 Woods, 23; *Nat. Security Bank v. Price*, 129 U. S. 223; *Stone v. Jenison*, 70 N. W. R. 149.

⁵ *Brighton v. White*, 128 Ind. 320.

⁶ *Roan v. Winn*, 93 Mo. 503. In this case there was no statute. Other states permit a preference to a director under some circumstances. Thus it was so held as to a transfer to a corporation whose officer had knowledge. *O'Brien v. Bridge Co.*, 55 N. Y. Supp. 206.

⁷ *Atkinson v. Rochester Printing Co.*, 114 N. Y. 168; *Lamb v. Cecil*, 25 W. Va. 288. A transfer to secure a loan to a creditor without knowledge is good as to the loan though it is also security for past advances. *Stapylton v. Stockton*, 91 Fed. R. 326 (C. C. A.).

notice of the insolvency of the bank, are not preferential.⁸ So it was held under the national bank act even where the depositor was a director.⁹ But difficult cases arise where "runs" are made upon banks. The very fact that a "run" is made is proof positive that doubts as to the solvency of the bank are abroad. Every depositor who draws his money does it because he thinks the bank unsafe. If the bank fails, can depositors who have drawn their money be required to repay to the bank's representative on the ground of a fraudulent preference? The bank may not have been insolvent when the "run" upon it began, but sometime during the course of the run the bank became insolvent. How is that particular time to be fixed? Not one of the depositors could say that he had no notice of the insolvent condition, and he certainly secured his deposit in contemplation of insolvency. The question is one of the greatest difficulty. This much seems plain. If the bank was really insolvent when the "run" began, all payments made were in violation of the statute. It was the duty of the bank officers to close its doors. If, however, the bank was solvent when the "run" was initiated, the fair rule would seem to be that as long as the bank officers keep open its paying teller's window and pay checks or depositors, relying in good faith upon the bank's capacity to withstand the "run," all payments ought to be treated as payments in due course of business and not preferential.¹⁰ The last depositor paid before the window was closed ought to be in the same condition as the first depositor paid during the run. But all payments made to

⁸ *Dutcher v. Imp. & Trad. Nat. Bank*, 59 N. Y. 5; *Hayden v. Chemical Nat. Bank*, 84 Fed. R. 874 (C. C. A.), a transmission of remittances in ordinary course of business. And see *McDonald v. Williams*, 174 U. S. 397.

⁹ *Hayes v. Beardsley*, 136 N. Y. 299.

¹⁰ *Stone v. Jenison*, 70 N. W. R. 149. See also *McAfee v. Bland*, 11

S. W. R. 439. It was curiously enough held that a transfer by a cashier and a stockholder to a creditor was void because not for the benefit of all the creditors, on the singular ground that it would give a right of set-off against the bank. *Gatch v. Fitch*, 34 Fed. R. 566. The decision represents an aberration of an exceedingly able lawyer.

depositors, upon withdrawals from intimations by the bank officers are, of course, fraudulent preferences. An instance occurred in a western state which permits preferences, where a bank had large deposits; all the bank officers as well as the other large depositors withdrew their deposits. An assignment was then made and the bank was found to have but nine dollars in cash. Yet, miraculous as it may appear, no one was sued by the assignee. The small depositors, with but few exceptions, bore the whole loss. One of the great advantages of the national banking system is that such assignees are impossible. The excuse of an assignee, in the above case, would be that the bank could prefer creditors in that way as well as by assignment.

§ 327. **Preferences by national banks.**—Sections 5234, 5236 and 5242 of the Revised Statutes of the United States forbid preferences by insolvent national banks and require a *pro rata* distribution of its assets among its general creditors after prior claims are satisfied. Every transfer in contemplation of insolvency, as well as transfers by insolvent banks, are declared void. Insolvency under this statute is the general meaning of the phrase, not such an act alone as gives the comptroller the right to close the bank.¹ The bank is insolvent when it is reasonably certain that it must suspend.² But the payment to a depositor, though a director, by a bank insolvent, though long before suspension, in the ordinary course of business, has been held to be no preference.³ The rules governing the payments to depositors, dur-

¹ *Irons v. Manufacturers' Nat. Bank*, 6 Biss. 301.

² *Roberts v. Hill*, 24 Fed. R. 571, which was a rehearing of *Roberts v. Hill*, 23 Fed. R. 311, where the court delivered itself of the following astounding proposition: A transfer of collateral to prevent a failure is not fraudulent, even though the bank is insolvent; but a transfer in order to keep the securities out of the assets would

be fraudulent. But *Stapylton v. Stockton*, 91 Fed. R. 326, lends some little countenance to this idea. An Alabama court held that renewals of notes, where the originals were not given up, were not evidences of debt under the statute. *First Nat. Bank v. Johnston*, 97 Ala. 655. "*Haud equidem invideo, miror magis.*"

³ *Hayes v. Beardsley*, 136 N. Y. 299. See the next note.

ing the course of a run, would be those stated in the last section. If insolvency actually exists, known to the directors, any transfer which results in a preference is conclusively presumed to be fraudulent.⁴ The creditor's ignorance of the insolvency is immaterial.⁵ Thus, a clearing-house which has issued loan certificates had in its possession paper for collection upon which it had no lien when it received notice of the bank's insolvency. It also held what might be termed due-bills for balances on settlements for former days as a set-off against proceeds of collections. It naturally desired to offset against the proceeds of collections the due-bills and the loan certificates which the insolvent bank owed. After the circuit court of the United States and the circuit court of appeals had both entangled themselves in errors upon the question, the Supreme Court held that the clearing-house could set off the due-bills against the proceeds of the collections made after notice of the insolvency, but not the loan certificates.⁶ The propriety of the holding was obvious, but the diverse rulings of the lower courts show the uncertainty of judicial conclusions. In another case a certain bank used a second bank as its clearing agent. On Saturday evening the directors determined to close the first bank. The comptroller appointed a receiver at ten o'clock on Monday morning, but a half hour before that time the cashier of the insolvent bank sent to the clearing agent a lot of checks and drafts and its check for its deposit with the clearing agent, and the clearing agent sent back its ne-

⁴ *Nat. Security Bank v. Price*, 129 U. S. 223. Although this is the statement of this case a late decision of the court should be consulted. It seems that any payment made while the bank is a going concern, in the due course, without any intent to prefer, is not forbidden. See *McDonald v. Williams*, 174 U. S. 397.

⁵ *Case v. Citizens' Bank*, 2 Woods, 23.

⁶ *Yardley v. Philler*, 167 U. S. 344, reversing both 62 Fed. R. 645, and 58 Fed. R. 746. The case of *Philler v. Jewett*, 166 Pa. 456, is distinguishable because the clearing-house there had a lien. So it may be said of *Philler v. Patterson*, 168 Pa. 468. But it may be said that the clearing-house arrangement was made because the bank was in difficulties, and hence there was notice of insolvency.

gotiable certificate for the amount. At the time the clearing agent held the first bank's certificate of deposit. This attempt to give the clearing agent an offset against its certificate in the hands of the insolvent bank was frustrated by the holding that it was an attempt to fraudulently prefer.⁷ But this statute does not invalidate liens, equities or rights between parties which arose prior to and were not instituted in contemplation of insolvency;⁸ nor does it invalidate a set-off which another bank has against the insolvent bank.⁹ It has been held that security given to protect a loan which was perfectly legal at the time it was made is not invalidated though the creditor knew of the threatened insolvency.¹⁰ This ruling can be justified on the ground that insolvency was not certain; otherwise it gives a preference as to certain assets. Another case held that after a suspended bank had resumed with the consent of the comptroller, and in order to lift an attachment gave a bond with sureties, the bank transferring property to the sureties, this preference of the sureties was not unlawful.¹¹ The fallacy of this case is that the attachment was not good,¹² and the comptroller's action was no proof that the bank was not insolvent. The fact is that this statute ought always to be so construed as to defeat any inequality among creditors. It is the duty of the courts to be exceedingly vigilant, and every doubt ought to be resolved against the creditor who obtains an advantage. Many and devious will be the ways in which it will be attempted to avoid this statute, for even if men are made upright some of them are capable of seeking out "many inventions."

⁷Nat. Security Bank v. Butler, 129 U. S. 223. But the clearing agent ought to have been permitted to set off the first bank's deposit. See note 9 to this section.

⁸Scott v. Armstrong, 146 U. S. 499.

⁹In re Armstrong, 41 Fed. R. 381.

¹⁰Armstrong v. Chemical Nat.

Bank, 41 Fed. R. 234; Casey v. Credit Mobilier, 2 Woods, 77.

¹¹Price v. Coleman, 23 Fed. R. 694.

¹²It was against a national bank, which is protected from an attachment either from a state court or from a United States court. See § 336, *post*.

§ 328. **Receivers or trustees for state banks.**—However a receiver or assignee or trustee may be appointed, he acquires title to the bank's assets.¹ The appointment under a statute of trustees, the appointment of an assignee by deed in trust for creditors, or the appointment of a receiver by the court, are all methods of attaining this result. The suit to secure the appointment of a receiver may be brought by a creditor or a stockholder, with the proper averments to show the necessity.² The bank is the necessary defendant; the officers need not be made parties.³ Where the suit is by a creditor, it is on behalf of all other creditors,⁴ and after other creditors have come in the plaintiff cannot discontinue the suit without their concurrence.⁵ Only one suit of the kind can be maintained; other creditors must come into that particular suit.⁶ Sometimes a judgment at law must have been obtained and at other times not.⁷ The controlling statute determines this fact. Where the stockholders sue for a receiver on account of corporate mismanagement, they must show their inability to obtain relief in the corporation itself.⁸ But if the suit is for the purpose of winding up the corporation, or of obtaining the stockholders' liability, the suit will not be brought, except by a creditor. In

¹ Nevitt v. Bank of Port Gibson, 6 Smedes & M. 513; Haxton v. Bishop, 3 Wend. 13; De Wolf v. Sprague Mfg. Co., 11 R. I. 380. But in some states he holds only an equitable title. Chicago Co. v. Park Nat. Bank, 44 Ill. App. 150; Crews v. Farmers' Bank, 31 Grat. 348.

² See § 86, *ante*.

³ But in practice they will always be made parties, because relief will be asked against them. When the right to a receiver arises upon insolvency, the bank is the only necessary defendant. Attorney-General v. Columbia Bank, 1 Paige, 511.

⁴ See § 86 et seq., *ante*.

⁵ Atlas Bank v. Nahant Bank, 23 Pick. 480.

⁶ Hurlbut v. Kelley, 62 Wis. 590. Compare Palmer v. Bank of Zumbrota, 65 Minn. 90. A special procedure is sometimes given by statute. See In re Shackamaxon Bank, 4 Pa. Co. Ct. R. 194; Tefft v. North River Bank, 14 N. Y. Supp. 8.

⁷ See § 86 et seq., *ante*. Compare Am. Sav. Ass'n v. Bank, 65 Minn. 139.

⁸ This rule is embodied in the ninety-fourth equity rule of the United States Supreme Court. Uselessness of such an application is an excuse for not making it.

such a suit where a receiver is appointed, it is really immaterial as to the defendants who are served whether the suit for the stockholders' liability should be brought by the creditors or the receiver. The relief is granted in the one action. Where a receiver may be sued for by a state officer, such as an auditor of state,⁹ or bank commissioners,¹⁰ the courts are not ousted of their jurisdiction to grant a receiver on the application of creditors or stockholders.¹¹ A receiver may be appointed by the court *ex parte*,¹² where the statute does not require notice.¹³ Where there is no corporate management¹⁴ or where the corporation is dissolved,¹⁵ a receiver is appointed as a matter of course. Where two courts attempt to appoint receivers, the right depends upon the priority of judicial action.¹⁶ The number of receivers is discretionary with the court.¹⁷ If he acts, his failure to take an oath is no bar to his action.¹⁸ The payment allowed for his services is to be determined by the responsibility assumed, the skill and labor expended and the rate of compensation usually allowed for services of a like character.¹⁹ His bond is liable for his defaults.²⁰

§ 329. Rights of receivers or trustees of state banks.—
The rights of an assignee in insolvency are determined by the deed of assignment unless a statute controls his action.

⁹ Dickerson v. Cass Co. Bank, 64 N. W. R. 395.

¹⁰ People's Sav. Bank v. Superior Court, 103 Cal. 27; Bank Commissioners v. Bank of Buffalo, 6 Paige, 497; Bank Commissioners v. Central Bank, 5 R. I. 12.

¹¹ Dickerson v. Cass Co. Bank, 64 N. W. R. 395.

¹² Warren v. Fake, 49 How. Pr. 480.

¹³ People's Sav. Bank v. Superior Court, 103 Cal. 27. Compare Murray v. Am. Surety Co., 70 Fed. R. 341.

¹⁴ Dayton v. Borst, 7 Bosw. 115; Dobson v. Simonton, 78 N. C. 63.

¹⁵ See United States v. Church, 5 Utah, 361, 136 U. S. 1.

¹⁶ People v. Central City Bank, 53 Barb. 412.

¹⁷ Wiswell v. Starr, 50 Me. 381, under a statute; but the rule is the same without a statute.

¹⁸ Dayton v. Borst, 7 Bosw. 115.

¹⁹ Bank Comm'rs v. Franklin Sav. Inst., 11 R. I. 557.

²⁰ But only for the original appointment, where the bond was executed for that purpose. Governor v. Bowman, 44 Ill. 499; Governor v. Lagow, 43 Ill. 134.

A receiver upon his appointment takes the title that the bank possessed, no more and no less.¹ But where a fraudulent conveyance has been made by the corporation or a fraudulent preference has been given, the receiver may sue to set it aside.² Where the statute forbids preferences by an insolvent bank, the receiver's title is superior to an attachment levied while the bank was insolvent.³ It would also be an unlawful preference.⁴ The receiver will not be estopped by the fact that he has paid part of the claim without knowledge thereof.⁵ He becomes an assignee of the assets,⁶ and represents both the bank and its creditors. He may revive a judgment in favor of the bank though a forfeiture has been decreed.⁷ He may sue upon the note of directors given to the bank to replace reduced capital.⁸ He supersedes the officers of the bank in the management of it,⁹ and may, of course, be substituted in all actions pending against the bank.¹⁰ He is entitled to seek the advice of the court,¹¹ and one case has held that he can transfer the assets of the bank in payment of claims against it.¹² There is

¹ *Casey v. Credit Mobilier*, 2 Woods, 77; *Lincoln v. Fitch*, 42 Me. 456; *Hubbard v. Hamilton Bank*, 7 Met. 340; *Bank of Lyons v. Dunmore, Hill & D.* Supp. 398.

² *Carey v. Giles*, 10 Ga. 9; *Casey v. Cavaroc*, 96 U. S. 467; *Lamb v. Cecil*, 25 W. Va. 288. These two cases were suits by the assignee. There is some authority to the effect that an assignee cannot sue to set aside the assignor's fraudulent conveyance. *Leavitt v. Yates*, 4 Edw. Ch. 139; *Atkinson v. Rochester Printing Co.*, 114 N. Y. 168.

³ *Crane v. Pacific Bank*, 106 Cal. 64. Compare *New Orleans Imp. Co. v. Citizens' Bank*, 10 Rob. (La.) 14. But *contra*, *Dodson v. Wightman*, 49 Pac. R. 790 (Kan. App.); and see cases in the next note.

⁴ But see *Hubbard v. Hamilton*

Bank, 7 Met. 340; *Arnold v. Weimer*, 40 Neb. 216. Foreign receivers are not protected against attachment. *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367.

⁵ *Lamb v. Cecil*, 25 W. Va. 288.

⁶ *Bradford v. Jenks*, 2 McLean, 130. Holders of notes, on the other hand, are not assignees. *Wood v. Dummer*, 3 Mason, 308.

⁷ *Robertson v. Agricultural Bank*, 28 Miss. 237.

⁸ *Sickles v. Herold*, 36 N. Y. Supp. 488.

⁹ This follows from the order appointing the receiver.

¹⁰ This is usually upon motion in the action.

¹¹ *In re Van Allen*, 37 Barb. 225; *People v. St. Nicholas Bank*, 76 Hun, 522.

¹² *Atkinson v. Davidson*, 2 Pin. 48.

one other species of claim which a receiver may sue for under some statutes,¹³ while under other systems he cannot.¹⁴ It is useless to seek to reconcile the decisions upon this subject, but the clear weight of authority is that the stockholders' liability belongs to the creditors, and a receiver without an express statute or a fair implication from a statute cannot sue for this liability.¹⁵ But since this liability will not be enforced except when the bank is insolvent, and since the rule of equality ought to prevail among general creditors, the rule ought to be that the receiver can sue. Yet in those states which permit a creditor to sue a stockholder at law and gain a preference, this suit by the receiver cannot well be allowed.¹⁶ But in all those jurisdictions which permit or require a suit for the stockholder's liability only in equity, where all the creditors and stockholders are parties, the receiver and no one else ought to be permitted to bring the action.¹⁷ And this may be said to be the general trend of the cases

§ 330. Right of set-off as to insolvent bank.—The depositor's right of set-off has already been noticed,¹ as well as the bank's right against the depositor.² The debtor to the

¹³ See § 65, *ante*, note 1. The case of *Steinke v. Loofbourrow*, 54 Pac. R. 120, is a good instance of the uncertainty of the statute law. It held that under the Iowa statute the receiver could not sue, yet at about the same time the Supreme Court of Iowa held that he could sue. *State v. Union Stock Yards Bank*, 70 N. W. R. 752. See also *Howarth v. Ellwanger*, 86 Fed. R. 54 (C. C. A.); *Watterson v. Master-son*, 15 Wash. 511; *Ueland v. Hagan*, 73 N. W. R. 169.

¹⁴ See § 65, *ante*, note 1, and cases cited in *Steinke v. Loofbourrow*, *supra*.

¹⁵ See § 65, *ante*, note 1. But at the same time the same result can

be achieved by a suit in equity against all the stockholders, except that non-resident stockholders cannot be reached in this way. See *Howarth v. Ellwanger*, 86 Fed. R. 54.

¹⁶ Both a suit at law and an equitable action are possible in Massachusetts as alternative remedies. *Stebbins v. Scott*, 52 N. E. R. 535. Equity has the jurisdiction without the aid of a statute.

¹⁷ This is to be understood with the qualification that, if the receiver will not sue, the creditors may in equity. *Anderson v. Seymour*, 73 N. W. R. 171.

¹ See § 144, *ante*.

² See § 140, *ante*.

bank may set off against his debt owing to the bank any claim due to him at the time of insolvency,³ but not any claims purchased by him after insolvency.⁴ In equity he may set off any claim owned by him, but not matured at the date of insolvency,⁵ but the debtor has no right of set-off upon an unliquidated demand.⁶ A claim for pay for services rendered the bank is a good ground of set-off.⁷ The state may set off taxes due to it against its debt to the bank.⁸ The debtor or his surety may set off against his check upon another bank, cashed by the insolvent bank, an unpaid draft given for it,⁹ or his balance in the bank agreed by him to be appropriated to the debt.¹⁰ A bank holding a cashier's check upon the insolvent bank, though only for collection, may set it off against its debt to the insolvent bank.¹¹ Certified or accepted checks would no doubt be a good set-off.¹² In a few states where the holder of a check can sue upon it after presentation, when the drawee has sufficient funds, a holder of a presented check would probably have the right to set it off.¹³ But in those states holders of unrepresented

³ Fennell v. Nesbit, 16 B. Mon. 351; Salladin v. Mitchell, 42 Neb. 859. See Jackson v. Bank of Paterson, 1 Stockt. 205.

⁴ Smith v. Mosby, 9 Heisk. 501; Colt v. Brown, 12 Gray, 233; Davis v. Knipp, 92 Hun, 297; In re Middle Dist. Bank, 1 Paige, 585. One case allows a set-off where the claim was assigned to the debtor after suspension. Beers v. Hussey, 1 Bailey, Eq. 168. It is wrong.

⁵ In re Middle Dist. Bank, 1 Paige, 585; Arnold v. Nies, 36 Leg. Int. 437; Jones v. Robinson, 26 Barb. 310; and see § 144, *ante*.

⁶ In re Van Allen, 37 Barb. 225.

⁷ Davis v. Industrial Mfg. Co., 114 N. C. 321.

⁸ Commonwealth v. Phoenix Bank, 11 Met. 129.

⁹ Armstrong v. Warner, 49 Ohio St. 376.

¹⁰ Chase v. Petroleum Bank, 66 Pa. 169.

¹¹ Farmers' Dep. Bank v. Penn Bank, 123 Pa. 283. The bank as bailee had the right to recover the whole amount. See the case of Shryock v. Brashore, 33 Leg. Int. 56, as to the effect of notice of the insolvency of the drawing bank upon a bank draft. It becomes a check revoked.

¹² Such a check has become a debt of the bank, but the holder must have had it at the date of the bank's suspension.

¹³ The theory is that so much of the deposit as the check represents passes to the holder upon presentation. See § 147, *ante*. Whether the

checks, perhaps, and in all the other jurisdictions, including the United States courts in those very states, holders of unaccepted or uncertified checks cannot set them off against the bank's claim.¹⁴ Under the national banking act a set-off does not create an illegal preference, even if the claim against the bank is unmatured. The highest authority has permitted an equitable set-off where the bank while insolvent discounted a note and placed the proceeds to the credit of the discounter; the depositor was allowed a set-off for the balance of his deposit, though the bank's debt against him was not matured.¹⁵ But even if the depositor's claim were not connected with the bank's claim, he would none the less have an equitable set-off.¹⁶ But the claim must have belonged to the debtor at the date of the suspension of the bank.¹⁷ No demand for the set-off prior to bringing the cross-suit is needed where the bank has suspended.¹⁸ The debtor who is entitled to a set-off, but pays the bank's claim, may recover his demand in full, where he paid under pro-

courts of Illinois will hold that the holder of an unpresented check gets no right of set-off no one can say with certainty on account of the language which that state's courts hold in regard to the check being an assignment at law. If it is, then the right of set-off arises because the check holder owned the claim at the date of insolvency if he then had the check. But imagine for one moment the iniquitous result. A man with a large deposit, who has suspicions of the bank, can give checks upon the bank to the bank's debtors, who can set them off against their debts to the bank, thus enabling themselves to pay him for the checks their face value. In this way he would get a full preference. The courts must therefore hold that unpresented checks are not subjects of set-off by the

check holder, nor are presented checks when the holder or the drawer has notice of insolvency.

¹⁴ The holder has no right of action against the bank, and hence he could not have set-off.

¹⁵ *Scott v. Armstrong*, 146 U. S. 499, reversing 36 Fed. R. 63.

¹⁶ *Yardley v. Clothier*, 51 Fed. R. 506, 3 U. S. App. 207; *Adams v. Spokane Drug Co.*, 57 Fed. R. 888; *Clots v. Bentley*, 5 Alb. Law Jour. 286; *Mercer v. Dyer*, 15 Mont. 317.

¹⁷ *Venango Nat. Bank v. Taylor*, 56 Pa. 14; *Beckham v. Shackelford*, 8 Tex. Civ. App. 660. In this case the receiver allowed the set-off, and the debtor gave up his security. *Contra*, *Davis v. Knipp*, 92 Hun. 297.

¹⁸ *Chemical Nat. Bank v. Bailey*, 12 Blatch. 480.

test.¹⁹ The bank has a right of set-off for a bill, whose proceeds represented the claim of an insolvent depositor, where the receiver of the bank had obtained the bill after the insolvency of the depositor.²⁰

§ 331. Allowance and payment of claims.—It is usual, after a trustee or a receiver is in possession of the assets of the bank, for such officer to advertise the time for the presentation of claims. But he may pass upon claims before the date fixed in the notice;¹ nor does one who has failed to present his claim within the time lose it, where he has been guilty of no laches;² but he loses his right if the fund is distributed and he had knowledge of the proceedings,³ although, in the absence of a statute preventing such action, he could still sue the bank, if it had a corporate existence. The claim may be filed in the action wherein the receiver is appointed.⁴ The claim of a debtor is a single one in the sense that he cannot claim the right to have two claims allowed for the same claim, and have dividends upon each until he has received enough to satisfy the claim.⁵ Yet, if he holds collaterals, he is entitled to the allowance of his whole claim, without regard to payments received by him upon the collaterals, whether before or after the insolvency.⁶ He is entitled, of course, to but one satisfaction, and the receiver may redeem the collaterals if they are more than suf-

¹⁹ *In re Bank of Minnesota*, 73 N. W. R. 1096.

²⁰ *Robinson v. Hawes*, 20 N. Y. 84.

¹ *Bissell v. Heath*, 98 Mich. 472.

² *Glenn v. Farmers' Bank*, 80 N. C. 97.

³ *Glenn v. Farmers' Bank*, 84 N. C. 631.

⁴ *Blake v. State Sav. Bank*, 12 Wash. 619. This decision is wholly wrong as an authority on the loss of the deposit in the insolvent bank by mingling. See § 344, *post*.

⁵ *Latimer v. Wood*, 73 Fed. R. 1001, 36 U. S. App. 581.

⁶ *Merrill v. National Bank*, 173 U. S. 131; *In Matter of Bates*, 118 Ill. 524; *Chemical Nat. Bank v. Armstrong*, 59 Fed. R. 372, 16 U. S. App. 465, reversing 50 Fed. R. 798; *People v. Remington*, 121 N. Y. 336; *Bank v. Haug*, 47 N. W. R. 33. *Contra*, *First Nat. Bank v. Williamson*, 35 S. W. R. 573. Here the creditor had his principal claim, and also collateral notes, indorsed by the bank; he claimed dividends on the principal debt and on the collaterals.

ficient.⁷ Or, if two corporations, both insolvent, are liable upon the same claim, the holder may receive dividends from both corporations until he receives one satisfaction.⁸ But where the claim has been actually satisfied by a recovery of a judgment against a bank officer and a satisfaction thereof, the claim is not entitled to allowance.⁹ Officers of the bank¹⁰ or stockholders¹¹ holding claims may share in the distribution for claims which they hold. But a claim based upon an *ultra vires* sale by a stockholder of his stock to the bank is not entitled to allowance.¹² Stockholders who have paid off depositors are entitled to be subrogated to the depositors' rights,¹³ and even though they bought up claims at a discount, they may share in the distribution for the face value of claims,¹⁴ although, of course, such claims would not be a good set-off for their stockholders' liability, except, perhaps, to the amount of dividends upon them.¹⁵ The allowance of a claim does not, of course, satisfy it or change its nature.¹⁶ The creditor by submitting his claim has been held to waive the right to raise a question as to the constitutionality of the appointment of the receiver or assignee.¹⁷ If the claim is disallowed by the receiver the holder may contest the matter in the same action,¹⁸ or may sue the bank if it has any legal existence,¹⁹ or may sue the receiver.²⁰

⁷ In the Matter of Bates, 118 Ill. 524.

⁸ Bank v. Kendrick, 92 Tenn. 437.

⁹ Dobson v. Simonton, 95 N. C. 312.

¹⁰ In re Insurance Co., 9 Lanc. Bar, 119.

¹¹ In re Humboldt Trust Co., 3 Pa. Co. Ct. R. 621. The agent of the shareholders of a national bank cannot set off against the pledgee of stock of a shareholder the stockholder's indebtedness. McConville v. Means, 21 Wkly. Law Bul. 193.

¹² In re Columbian Bank, 147 Pa. 422.

¹³ City Bank v. Crossland, 65 Ga. 734.

¹⁴ Appeal of Craig, 92 Pa. 396.

¹⁵ This would be possible in an equity suit, where the judgment could be so drawn. It would be impossible at law.

¹⁶ Warrensburg Asso. v. Zoll, 83 Mo. 94.

¹⁷ Dowd v. City Bank, 59 N. H. 391.

¹⁸ Citizens' Sav. Bank v. Ingham, 98 Mich. 173.

¹⁹ See § 317, *ante*.

²⁰ See § 323, *ante*.

§ 332. **Holders of notes of the bank.**—The vicissitudes of holders of the notes of insolvent banks in the days of state banks of issue form a melancholy chapter in the history of state banks. Owing to what may be termed an inherent defect in the article, they were in a state of chronic insolvency. Sometimes the holders of their notes were given a preference upon insolvency.¹ At other times they were not entitled to share in the assets because the notes were secured.² Stockholders with bills were in the same situation as other bill holders.³ The bank was compelled in some way to redeem its notes, yet some cases permitted the notes to be charged against the bank only for the amount that was paid for them by the holder.⁴ If the note holder escaped this calamity he was likely to find that the assets of the bank had been appropriated by the state for trustees to administer upon. It is true that he could follow these assets into the hands of the trustees,⁵ and that he would not be prejudiced by the state's attempted embezzlement.⁶ But the notes became worthless upon insolvency. They could not be sold to debtors of the bank, because, whether transferred after insolvency or not, they were not a set-off against the assignees in insolvency⁷ or against the receiver, except by stat-

¹ *Moses v. Ocoee Bank*, 1 Lea, 398; *Woodward v. Central Bank*, 4 Ga. 323; *Miller v. Andrews*, 3 Cold. 380; *Robinson v. Bank of Darien*, 18 Ga. 65; *In re Pennsylvania Bank*, 39 Pa. 103. But this preference did not apply to voluntary assignments by the bank. *Dobbins v. Walton*, 37 Ga. 614. In another state there was no preference. *Cochituate Bank v. Colt*, 1 Gray, 382.

² *People v. Holmès*, 3 Mich. 544. See *Appeal of Hogg*, 22 Pa. 479.

³ *Belcher v. Willcox*, 40 Ga. 391.

⁴ *Griffin v. Central Bank*, 3 Ga. 371; *Belcher v. Willcox*, 40 Ga. 391; *Robson v. Benton Banking Co.*, 7 Smedes & M. 724.

⁵ *Ringo v. Real Estate Bank*, 13 Ark. 563.

⁶ *Barings v. Dabney*, 19 Wall. 1.

⁷ *Eastern Bank v. Capron*, 22 Conn. 639; *Ringo v. Biscoe*, 13 Ark. 563 (see 29 Am. Law Rev. 94, 459); *Northampton Bank v. Winder*, 3 Clark, 284; *In re White Mountain Bank*, 46 N. H. 143. And compare *Commercial Bank v. Thompson*, 7 Smedes & M. 443; *Clarke v. Hawkins*, 5 R. I. 219; *Farmers' Bank v. Willis*, 7 W. Va. 31; *Gee v. Bacon*, 9 Ala. 699. But under statutes they were held to be a set-off against the assignee and sometimes without the aid of a statute. *Robinson v. Bank of Darien*, 18 Ga. 65; *Morse*

ute. But if the note holder was indebted to the bank, by the aid of a statute he could set off the notes which he held as against the bank,⁸ provided he owned them at the date of insolvency, except in one state, which held that the set-off was not permissible in spite of the statute, because all creditors should be placed on an equality.⁹

§ 333. Receivers of national banks.—The national banks are governed by the provisions of the national banking act, with the amendments thereto. Whenever a national bank has failed to make specie payments upon its notes or has become insolvent, the power is given to the secretary of the treasury, exercised in fact through the comptroller of the currency, to take possession of the bank by a receiver. This power has been frequently decided to be not a power granted to the comptroller to perform a judicial act, so that the Supreme Court of the United States has peremptorily refused to reopen the question.¹ This proceeding may be obviated where the capital is simply impaired by the imposition of a voluntary assessment upon the stockholders, wherein the assessment is collectible only by a forfeiture of the shares of stock.² The sale of the stock is void unless it brings the amount of the assessment.³ Another method of meeting losses would be a reduction in the capital stock, which has been frequently resorted to in order to obviate an assessment. But where the comptroller decides that the

v. Chapman, 24 Ga. 249; Belcher v. Willcox, 40 Ga. 391 (for what was paid for them by the holder); Dunlap v. Smith, 12 Ill. 399; Exchange Banking Co. v. Mudge, 6 Rob. (La.) 397; Union Bank v. Ellicott, 6 Gill & J. 363. In Mel v. Holbrook, 4 Edw. Ch. 539, the set-off was allowed for the same notes the debtor received for his note.

⁸ Williams v. Planters' Bank, 12 Rob. (La.) 125; American Bank v. Wall, 56 Me. 167; Mandeville v. Bracy, 31 Miss. 460; Niagara Bank

v. Rosevelt, 9 Cow. 409; Mann v. Blount, 65 N. C. 99; Clarke v. Hawkins, 5 R. I. 219.

⁹ Exchange Bank v. Knox, 19 Gratt. 739.

¹ Bushnell v. Leland, 164 U. S. 684, citing the former cases.

² This assessment is under section 5205, Revised Statutes. The directors cannot levy it. Hulitt v. Bell, 85 Fed. R. 98.

³ Merchants' Nat. Bank v. Fouche, 103 Ga. 851.

bank is insolvent, his decision is conclusive.⁴ The bankruptcy law formerly in force did not apply to national banks.⁵ The power of the comptroller to appoint a receiver applies to the cases specified in the national banking law and no others.⁶ But the courts may appoint receivers at the suit of either the stockholders or creditors, and where a receiver has been appointed the comptroller cannot appoint another.⁷ A state court may appoint a receiver at the suit of a creditor, although the stockholders are applying for an appointment in the federal court.⁸ The appointment of the receiver by the comptroller is presumed to be made by the secretary of the treasury.⁹

§ 334. Effect of appointment of receiver of national bank.—The appointment of the receiver does not dissolve the corporation. The bank may be sued¹ without joining the receiver,² but he may be substituted and then the bank becomes merely a nominal party.³ But the receiver may be sued also with⁴ or without the bank being joined.⁵ But he supersedes the officers of the bank in its management, and the title to all the assets of the bank vests in him.⁶ He may

⁴ Cadle v. Baker, 20 Wall. 650; (C. C. A.). See Wolf v. National Washington Nat. Bank v. Eckels, 57 Fed. R. 870. Bank, 178 Ill. 85.

⁵ In re Manufacturers' Nat. Bank, 5 Biss. 499.

⁶ Irons v. Manufacturers' Nat. Bank, 6 Biss. 301; Wright v. Merchants' Nat. Bank, 1 Flip. 568.

⁷ Harvey v. Lord, 11 Biss. 144. Compare Wash. Nat. Bank v. Eckels, 57 Fed. R. 870. The appointment may be *ex parte*. Ellwood v. First Nat. Bank, 41 Kan. 475, unless a statute forbids it.

⁸ Merchants' Bank v. Masonic Hall, 63 Ga. 549.

⁹ Price v. Abbott, 17 Fed. R. 506.

¹ See § 322, *ante*, note 6.

² Denton v. Baker, 79 Fed. R. 189

³ Grant v. Spokane Nat. Bank, 47 Fed. R. 673. He is entitled to be substituted. Sioux Falls Nat. Bank v. First Nat. Bank, 6 Dak. 113. This case was reversed in Thompson v. Sioux Falls Nat. Bank, 150 U. S. 231, but affirmed upon this point. Denton v. Baker, 79 Fed. R. 189.

⁴ Green v. Walkill Nat. Bank, 7 Hun, 63.

⁵ Turner v. First Nat. Bank, 26 Iowa, 562.

⁶ First Nat. Bank v. Pahquioque Bank, 14 Wall. 383. In some jurisdictions he sues as assignee in the name of the assignor. Chicago Co. v. Park Nat. Bank, 44 Ill. App. 150.

sue upon them in his own name,⁷ or he may use the name of the bank.⁸ He succeeds to all the bank's rights of action,⁹ including the rights of the bank to sue its officers for negligence in the management of its affairs,¹⁰ as well as for violations of the national banking law.¹¹ But a cause of action which belongs to a creditor or person who has been defrauded by the officers of the bank he has no concern with and cannot release.¹² It was formerly erroneously decided that he alone could sue for the negligence of the directors,¹³ or for violations of the banking law,¹⁴ but that idea has been thoroughly exploded, and a creditor on behalf of all may sue in equity, where he refuses to bring the action.¹⁵ The lawfulness of his appointment cannot be questioned by a debtor¹⁶ or by the stockholders.¹⁷ He may enforce the statutory liability of the stockholders by a suit, either against them singly¹⁸ at law, or in equity against all of them.¹⁹ The amount of the assessment upon the stockholders is determined by the comptroller,²⁰ but a court having acquired ju-

But in others he has the legal title. *Haxton v. Bishop*, 3 Wend. 13; *De Wolf v. Sprague Mfg. Co.*, 11 R. L. 380.

⁷ *First Nat. Bank v. Pahquioque Bank*, 14 Wall. 383.

⁸ Case last cited.

⁹ *Case v. Berwin*, 22 La. Ann. 321; *Movius v. Lee*, 30 Fed. R. 298.

¹⁰ *Movius v. Lee*, 30 Fed. R. 298.

¹¹ *Gerner v. Thompson*, 74 Fed. R. 125; *Hayden v. Thompson*, 67 Fed. R. 273.

¹² *Barnes v. Pogue*, 29 Wkly. Law Bul. 382. This, of course, is correct because this right of action never belonged to the corporation. The court's reasoning in the case shows no proper understanding of the principle involved.

¹³ *Howe v. Barney*, 43 Fed. R. 668.

¹⁴ *National Ex. Bank v. Peters*, 44 Fed. R. 13; *Bailey v. Mosher*, 63

Fed. R. 488, 27 U. S. App. 339; *Gerner v. Thompson*, 74 Fed. R. 125. *Hayden v. Thompson*, 67 Fed. R. 273, required an order from the comptroller to the receiver, but *Hayden v. Thompson*, 71 Fed. R. 60, was contrary thereto. See § 87, *ante*. All these cases are no longer authority. See next note.

¹⁵ *Ex parte Chetwood*, 165 U. S. 443; *Brinckerhoff v. Bostwick*, 88 N. Y. 52. If creditors have begun suit the appointment of a receiver does not supersede it. *McElhanny v. First Nat. Bank*, Fed. Cas. 8779.

¹⁶ *Cadle v. Baker*, 20 Wall. 650; *Platt v. Beebe*, 57 N. Y. 339.

¹⁷ See § 70, *ante*. *Washington Nat. Bank v. Eckels*, 57 Fed. R. 870.

¹⁸ See § 70, *ante*.

¹⁹ See § 70, *ante*.

²⁰ See § 70, *ante*.

risdiction for the appointment of a receiver may proceed and settle up all the affairs of the bank in one action.²¹ He is an officer of the United States, and hence may sue in the courts of the United States without regard to citizenship.²² He may bring an action without any authority from the comptroller.²³

§ 335. **Claims and assets.**—All the property of the bank at the time of its suspension becomes fixed as a fund for distribution among the general creditors.¹ The receiver, acting for the comptroller, allows the various claims or disallows them, as he deems right. If he allow a claim, the claim stands upon the footing of a judgment.² All other judgments against the bank for money are upon the same level.³ If he disallow a claim, suit may be brought against the corporation⁴ or against the receiver.⁵ If judgment be recovered, the judgment should direct that the claim, if the judgment is for money, be certified to the comptroller, not that it be paid by the receiver.⁶ But the claim is allowed only for its amount at the date of the failure of the bank, not at the date of the judgment.⁷ A claim for a special deposit is

²¹ See § 70, *ante*.

²² Price v. Abbott, 17 Fed. R. 506; Linn Co. Nat. Bank v. Crawford, 69 Fed. R. 532; Thompson v. Pool, 70 Fed. R. 725. And see § 350, *post*, upon this matter, as well as upon his right to transfer a suit to the federal court.

²³ See § 87, *ante*, and see note 14 to this section.

¹ Balch v. Wilson, 25 Minn. 299; National Bank v. Colby, 21 Wall. 609.

² National Bank v. Mechanics' Nat. Bank, 94 U. S. 437.

³ Irons v. Manufacturers' Nat. Bank, 27 Fed. R. 591.

⁴ Nat. Pahquioque Bank v. First Nat. Bank, 36 Conn. 325; First Nat.

Bank v. Pahquioque Bank, 14 Wall. 383.

⁵ Turner v. First Nat. Bank, 26 Iowa, 562. The creditor is not estopped, by taking a dividend on claim allowed, from suing on the claim disallowed. Chemical Nat. Bank v. World's Columbian Exp., 170 Ill. 82.

⁶ Merrill v. First Nat. Bank, 75 Fed. R. 148 (C. C. A.). See Flint Road Cart Co. v. Stephens, 32 Mo. App. 341, for a preferred claim.

⁷ White v. Knox, 111 U. S. 784. This case fully justifies Lord Bacon's dictum that the courts are sometimes like the bush whereunto the sheep flies for refuge, but is sure to lose a large part of his fleece.

a provable claim.⁸ A demand for rent accrued before the suspension is entitled to share in the distribution.⁹ The creditor is entitled to prove his full claim without regard to any collections made upon collaterals.¹⁰ The costs of the plaintiffs in a creditors' bill, where the action has been beneficial to the bank, may be ordered paid by the receiver,¹¹ but not the costs of a reversal obtained by them.¹² But the receiver cannot contract to pay part of a recovery as an attorney's fee without authority from the court.¹³ He cannot exchange, barter or trade the assets of the bank;¹⁴ he may compromise doubtful claims of the character allowed by statute by the authority of the court,¹⁵ but if the debts are not doubtful the order is invalid and the compromise ineffectual.¹⁶ But a compromise will not be disturbed after a long lapse of time.¹⁷ Nor can the receiver agree to a rescission of the bank's sale of its own stock, even though the sale were fraudulent.¹⁸

§ 336. Preferences and attachments.—The strenuous efforts made by the New York courts¹ to maintain their jurisdiction over a foreign corporation doing business with citizens of the state caused it to hold that a national bank before insolvency could be reached by a writ of attachment, provided it were solvent at the time of the levy;² but if it

⁸ *Turner v. First Nat. Bank*, 26 Iowa, 562.

⁹ *Chemical Nat. Bank v. Hartford Deposit Co.*, 161 U. S. 1.

¹⁰ *Chemical Nat. Bank v. Armstrong*, 59 Fed. R. 512, 16 U. S. App. 465; *Merrill v. National Bank*, 173 U. S. 131. And see § 331, note 6.

¹¹ *McElhenny v. First Nat. Bank*, Fed. Cas. No. 8779. But see next note.

¹² *Irons v. Manuf. Nat. Bank*, 36 Fed. R. 843; reversed, 121 U. S. 27.

¹³ *Barrett v. Henrietta Nat. Bank*, 78 Tex. 222.

¹⁴ *Ellis v. Little*, 27 Kan. 707. He

was authorized to sell and dispose of assets.

¹⁵ *In re Platt*, Fed. Cas. No. 11,211.

¹⁶ *Price v. Yates*, Fed. Cas. No. 11,418.

¹⁷ *Henderson v. Myers*, 11 Phila. 616.

¹⁸ *Wallace v. Hood*, 89 Fed. R. 11.

¹ See *Bank of Montreal v. Fidelity Nat. Bank*, 1 N. Y. Supp. 852, 112 N. Y. 667, overruling its former decisions in accordance with *Pacific Bank v. Mixer*, 124 U. S. 721.

² *Robinson v. National Bank*, 81 N. Y. 385; *People's Bank v. Mechanics' Nat Bank*, 62 How. Pr. 423

were insolvent at the date of levy the attachment was not good.³ Some countenance was obtained for this rule by expressions of the Supreme Court of the United States,⁴ but now it has been settled that an attachment, prior to final judgment, against a national bank is wholly void, whether the process is issued by a state or a federal court.⁵ Not only is this true of a direct levy, but it is true also of an indirect levy by garnishment upon the property of the bank not capable of manual caption,⁶ although, of course, the national bank can be garnished for its debt to a third party.⁷ No jurisdiction is obtained by such a levy against a non-resident national bank as to the property taken under attachment.⁸ Being void, the receiver's title is not affected by it.⁹ He need not move to set the attachment aside;¹⁰ nor will a levy be enjoined, because there is no necessity for injunction against a void thing.¹¹ Hence no preference can ever be gained as against a national bank by an attachment. Other fraudulent preferences given by national banks it is the

(the burden being on the assertor of insolvency to show it clearly). *Contra*, *Cadle v. Tracy*, 11 Blatch. 101; *McDonald v. First Nat. Bank*, 41 Ill. App. 368. One case erroneously held that the bank waived the right to object by traversing. *Norris v. Merchants' Nat. Bank*, 30 Ill. App. 54. New York held that the receiver could not move to vacate until he was made a party by order. *Tracy v. First Nat. Bank*, 37 N. Y. 523. But the code changed this rule. *National Bank v. Mechanics' Nat. Bank*, 89 N. Y. 440.

³ *Market Nat. Bank v. Pacific Nat. Bank*, 93 N. Y. 648; *Raynor v. Pacific Nat. Bank*, 93 N. Y. 371.

⁴ *First Nat. Bank v. Colby*, 21 Wall. 609.

⁵ *Butler v. Coleman*, 124 U. S. 721, construing §§ 915 and 5242, Revised Statutes; *Pacific Nat. Bank v.*

Mixer, 124 U. S. 721; *Bank of Montreal v. Fidelity Nat. Bank*, 112 N. Y. 667; *Planters' Bank v. Colby*, 91 Ga. 264. A tax levy was held void as against an insolvent national bank. *Woodward v. Ellsworth*, 4 Colo. 580.

⁶ *Rosenheim Co. v. Southern Nat. Bank*, 46 S. W. R. 1026 (Tenn.); *Safford v. First Nat. Bank*, 61 Vt. 373.

⁷ *Conway v. Schall*, 42 Wkly. Notes Cas. 328.

⁸ *Garner v. National Bank*, 66 Fed. R. 369. *Central Nat. Bank v. Richland Nat. Bank*, 52 How. Pr. 136, is an instance where the lower court was right.

⁹ But it may be set aside. *Harvey v. Allen*, 16 Blatchf. 29.

¹⁰ This is self-evident.

¹¹ *First Nat. Bank v. La Due*, 39 Minn. 415.

duty of the receiver to bring suit to set aside.¹² If he does not do so, either the stockholders or the creditors, by proper averment, may bring the action.¹³

§ 337. **Payment of interest.**—In the case of national banks the claims draw interest from the date of the suspension of the bank,¹ unless they are interest-bearing claims, when doubtless the contract would govern the rate of interest. The rule in regard to state banks is the same. Certificates of deposit and all other demands have been already noticed,² except bank bills, which, it has been held, do not draw interest from the date of a general suspension, but only from the date of a demand for payment.³

§ 338. **Agent succeeding receiver of national bank.**—The third section of the act of congress of June 30, 1876, provides that, when the receiver has fully paid all the claims against the bank, the assets may be turned over to an agent nominated by the stockholders. This agent succeeds to all the assets of the bank and is entitled to be substituted in any pending suit.¹ He, too, is an officer of the United States in the same sense that the receiver is.² He is indictable under the laws of the United States for misappropriation or embezzlement of the assets of the bank.³ If the sharehold-

¹² See § 337, *ante*, and note 15 to § 334, *ante*.

¹³ The stockholders would be within the 94th equity rule. The creditors should practically allege the same facts as the rule requires. See *Ex parte Chetwood*, 165 U. S. 443.

¹ *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437. But a creditor cannot sue the comptroller for this interest. *Chemical Nat. Bank v. Bailey*, 12 Blatch. 480.

² See § 159, *ante*.

³ *Crawford v. Bank of Wilmington*, 61 N. C. 136; *Ringo v. Biscoe*, 13 Ark. 563; *Bank of Louisiana v.*

Fowler, 10 Rob. (La.) 196. See *Attwood v. Bank of Chillicothe*, 10 Ohio, 526.

¹ *McConville v. Gilmour*, 36 Fed. R. 277.

² *Ex parte Chetwood*, 165 U. S. 443.

³ *United States v. Jewett*, 84 Fed. R. 142. It follows that a receiver would also be indictable. It seems difficult to reconcile the statement contained in this case with the doctrine of the last cited case. The court clearly mistakes the sense in which the word "agent" is used in *United States v. Northway*, 120 U. S. 327.

ers have paid an assessment upon their stock to the controller, and the assets after settlement of claims against the bank have been turned over to the agent of the stockholders, a shareholder, who has become such by a purchase for full value from a stockholder who had failed to pay his assessment, is not entitled to share in the assets until those who have paid their assessments are reimbursed.⁴ When all the claims against a bank are paid the stockholders succeed to the assets,⁵ but not until that time are they entitled to any share in the property of the bank.⁶

§ 339. **Priorities among creditors and claimants.**—It may be said to be a rule without exception that where a creditor enforces his claim against the assets of an insolvent bank, he can gain no priority from filing the suit to enforce his claim.¹ It is true that in some statutory systems the creditor first suing at law a stockholder for the stockholder's liability gains a preference as to that particular stockholder, but in such a case it is needless to observe the stockholder's liability is not an asset of the bank. In all cases, however, where the creditor sues in equity, he must sue on behalf of himself and all other creditors similarly situated, whether he sues to enforce a claim that belongs to the bank, such as the right to pursue the officers of the bank, or a claim of the bank against third parties, or the stockholders' liability. In either case all the general creditors are upon the same level.² But the so-called creditors

⁴ Richardson v. Wallace, 39 S. C. 216.

⁵ Bacon v. Robertson, 18 How. 480. Lum v. Robertson, 6 Wall. 277, holds the same doctrine as to a judicial forfeiture. The assets belong to the stockholders subject to the payment of the debts of the bank.

⁶ Hollister v. Hollister Bank, 2 Keyes, 245; State v. Commercial State Bank, 28 Neb. 677; Dabney v. State Bank, 3 S. C. 124. Unless,

of course, they have claims as creditors against the bank, when they come in as creditors. Appeal of Craig, 92 Pa. 396.

¹ Irons v. Manufacturers' Nat. Bank, 27 Fed. R. 591.

² Richmond v. Irons, 121 U. S. 27; Exchange Bank v. Knox, 19 Grat. 739; Marr v. Bank of West Tennessee, 4 Cold. 471; Robinson v. Gardner, 18 Grat. 509. And see §§ 61, 65, 68, 69, *ante*, and as to national banks see § 70, *ante*.

may have different rights as against the bank. Thus the claimant may be a mere general depositor, or he may be a special depositor. He may have been defrauded of his property by the bank, which has thus become a trustee for him as to what it has obtained. The bank may be bailee of his property by reason of a collection having been intrusted to it. The case may be one where trust funds are in the bank or public funds. The creditor may have an assignment from the bank of a particular fund or a portion thereof. Special preferences and priorities may be given by statute. Each one of these cases causes interesting questions of law to arise, which are somewhat difficult of settlement, owing to the difficulty of tracing the claimant's property into and separating it from the funds of the bank. It will be found that different courts have made wholly diverse rulings upon these subjects. One species of priority has already been noticed, that of set-off, whereby the claimant in effect obtains a priority by gaining the right to have his claim settled in full.³ In the succeeding sections we will examine these various subjects.

§ 340. General creditors.— Unless a system of preference is established by statute among general creditors, all those persons between whom and the bank the relation of debtor and creditor exists are general creditors. In a peculiar case it was held that creditors of the bank who, after the bank went into voluntary liquidation, had taken paper belonging to the bank in payment of their claims were not entitled to share in the assets, because the bank had indorsed the paper; the reason of the decision was that the bank has no such power.¹ But conceding that the relation of debtor and cred-

³ See § 330, *ante*.

¹ *Richmond v. Irons*, 121 U. S. 27. But if the bank took the benefit of the transaction it ratified the transaction as a whole; the plea of *ultra vires* was bad. Therefore this opinion is wrong. It misses wholly this view of the matter. But Stanley

Matthews was so great a lawyer that it is wonderful to find him writing an incorrect opinion. Perhaps this view of the case may be taken. There was an implied prohibition by statute and therefore the contract of indorsement was actually illegal. See § 33, *ante*.

itor exists, there is no preference among such creditors upon the assets. This principle has been applied in many ways. Where the directors of a bank paid into it a large sum of money to enable it to continue business, and an account was opened with the fund in the name of trustees, they were held to be mere general creditors.² Where a deposit is *rightfully* made by a trustee, the trustee is merely a general creditor,³ or where funds are rightfully deposited by an agent, the agent is nothing more than a general creditor.⁴ Public funds *properly* deposited in the bank give no preference; the public is merely a general creditor through the officer depositing the money.⁵ Certificates of deposit create no lien upon any portion of the assets,⁶ even though the banker promised to keep the funds deposited separate from the other funds of the bank.⁷ The same rule applies to certified and accepted checks.⁸ So collections deposited for credit when collected and credited create only the general relation of debtor and creditor;⁹ and in those jurisdictions which hold that a deposit for collection is a purchase by the bank, as soon as the deposit is credited the bank becomes a debtor to the depositor.¹⁰ General depositors in an insolvent bank, known to

² Booth v. Wills, 42 Fed. R. 11.

³ Fletcher v. Sharpe, 108 Ind. 276; McAfee v. Bland, 11 S. W. R. 439; Hawkins v. Cleveland R. R. Co., 89 Fed. R. 266 (C. C. A.).

⁴ Henry v. Martin, 88 Wis. 367.

⁵ In re West. Ins. Co., 38 Ill. 289; Otis v. Gross, 96 Ill. 612 (as to court funds). But see District Tp. v. Farmers' Bank, 88 Iowa, 194, and State v. Thum, 55 Pac. R. 858 (Idaho). In this case it will be noticed that the syllabus to the case made by the court itself misses the whole point of the decision. Judges would do well to leave this matter to a competent reporter.

⁶ Bayor v. Schaffner, 51 Ill. App. 180. This case is affirmed in the next case following.

⁷ Bayor v. American Trust & Sav. Bank, 157 Ill. 62. The court here says that the plaintiff's evidence was perjured and then proceeds to decide the case on the theory that it was true. Such a performance cannot be said to be proper for any court.

⁸ People v. St. Nicholas Bank, 77 Hun, 159. Or checks agreed to be accepted. Citizens' Bank v. Bank of Greenville, 71 Miss. 271.

⁹ Commercial Bank v. Armstrong, 148 U. S. 50. And see § 188, *ante*, for a full consideration of this question, and also § 133, *ante*.

¹⁰ Lanterman v. Travous, 73 Ill. App. 670, 174 Ill. 459; Doppelt v. National Bank of Republic, 74 Ill. App. 429, 175 Ill. 432. This latter de-

its officers to be insolvent, are not necessarily general creditors.¹¹ But in some jurisdictions they are held to be when the deposit becomes mingled with the bank's general funds,¹² but this doctrine is a mistake.¹³ But general depositors in a bank not known to its officers to be insolvent are of course mere general creditors.¹⁴ So banks with mutual credits or creditors upon open account are mere general depositors.¹⁵ Where the correspondent bank credits proceeds of collections to the bank which transmitted the paper for collection to it, the relation of debtor and creditor between the two banks results.¹⁶ The same result follows where the bank transmitting paper for collection sends it to the bank on which the paper is drawn, and the latter bank credits the transmitting bank and charges the paper against the drawers.¹⁷ Even where the depositor in the bank obtains a draft from the bank by his check, and the draft is not paid, he is merely a general creditor.¹⁸ Thus, it will be seen that whatever the transaction may be, if the money or thing of value received by the bank goes rightfully into the general fund and assets of the bank, the relation resulting is one of debtor

cision puts the case on the ground that the correspondent bank was a holder for value. The decision of the court upon the point in the text is therefore a bald *dictum*. But the other Illinois cases decide such a rule. *Craigie v. Hadley*, 99 N. Y. 131. But if the bank, on failure of the collection, can charge back to the depositor the check or draft not collected, what situation is the depositor in? These cases do not seem to comprehend that phase of the question.

¹¹ See § 344, *post*.

¹² See § 344, *post*.

¹³ See the next section and § 344, *post*.

¹⁴ Deposits in insolvent banks are trust funds only when the bank is

known to its officers to be insolvent.

¹⁵ *Faulker v. Union Banking Co.*, 6 Wkly. Notes Cas. 109. Unless the priority is given by statute. In *re Patterson*, 18 Hun, 221, 78 N. Y. 608; *Rosenblatt v. Manufacturers' Bank*, 69 N. Y. 358.

¹⁶ See § 189, *ante*. *Commercial Bank v. Armstrong*, 148 U. S. 50; *Bowman v. First Nat. Bank*, 9 Wash. 614; *Sunderlin v. Mecosta Sav. Bank*, 74 N. W. R. 478. This last case is an authority for the proposition that when a collection is made the relation of debtor and creditor results as to the depositor for collection.

¹⁷ See § 189, *ante*.

¹⁸ *People v. Merchants' Bank*, 78 N. Y. 269.

and creditor and the claimant becomes a general creditor.¹⁹ This is the true test and the only test to determine the rights of the creditor as to a priority.

§ 341. **Trust funds as a priority.**—As we have already seen, a deposit by a trustee rightfully made in the bank makes the trustee merely a general creditor of the bank.¹ But a man may be a trustee because he is acting in violation of the rights of some one else, and the result as to the bank is quite different from the former case. The bank, of course, may act upon what it knows. If it has no notice of the trust character of the fund it may treat the depositor as the owner.² But if it, knowing or having notice of the trust character of the fund, or knowing or having notice of the fact that the fund is the property of some one else than the depositor, acts in violation of the rights of the real owner or beneficiary, it becomes itself a trustee.³ Again, the real owner of the fund cannot be made a depositor against his will.⁴ A rightful trustee with the legal title is authorized to deposit the money to his credit as trustee, but not to his private credit;⁵ hence, if the bank knowingly permits one standing in a fiduciary relation to appropriate the trust fund for any other than a lawful purpose,⁶ or if it permits the trustee to take the fund for his private benefit,⁷ or if it knowingly appropriates the fund in violation of the trust,⁸ it becomes itself a trustee for the amount in favor of the beneficiary. If it has the means of knowledge or notice that the depositor is acting in violation of the rights of one who owns the fund and is himself a constructive trustee, by permitting or assenting to the act it becomes itself a trustee

¹⁹ If a general deposit is created and the depositor by fraud is induced to let his deposit remain, he is a general creditor. *Venner v. Cox*, 35 S. W. R. 769.

¹ See note 3 to last section.

² See §§ 135 and 136, *ante*.

³ See § 136, *ante*.

⁴ *State v. Midland Sav. Bank*, 71 N. W. R. 1011; *Winslow v. Harri-man Iron Co.*, 42 S. W. R. 698.

⁵ It is a wrongful mingling.

⁶ See § 136, *ante*.

⁷ See § 136, *ante*.

⁸ See § 136, *ante*, and *Am. Trust Co. v. Boone*, 29 S. E. R. 182.

ex maleficio.⁹ The result of the foregoing facts is that if the money came rightfully into the bank as a general deposit, by paying it out in violation of the trust the bank becomes liable to the beneficiary in the same way it stood liable to the trustee.¹⁰ But if a constructive trustee who is himself acting in violation of the rights of the real owner deposits the money in the bank, and the bank receives it with knowledge that the real owner of the fund does not assent to or is not cognizant of the deposit, the bank itself becomes a trustee *ex maleficio*, and the assets of the bank become impressed with a charge to the amount of the trust funds.¹¹ The reason of the rule is perfectly plain. The money of the real owner went to swell the assets of the bank. The bank knowingly mingled funds of which it was a trustee with funds which it owned, and hence the beneficiary has the right to have the whole fund impressed with a trust in his favor.¹² The reasons for this rule will be found fully stated

⁹ See § 136, *ante*.

¹⁰ That is to say, the beneficiary has only the claim of a general creditor. The bank received the fund rightly and the funds did not pass into the assets of the bank as a trust fund. The claim of the beneficiary is only a claim to recover damages for a breach of the trust.

¹¹ The bank knowingly receives the fund in violation of the trust. It is in the same position as any person would be who so received money. *Central Nat. Bank v. Life Ins. Co.*, 104 U. S. 54; *Van Alen v. American Nat. Bank*, 53 N. Y. 1; *Knatchbull v. Hallett*, L. R. 13 Ch. D. 696, state the principle. A very excellent article on the subject will be found in 2 Harv. Law Rev. 28.

¹² *Myers v. Board of Education*, 51 Kan. 87; *Wasson v. Hawkins*, 59 Fed. Rep. 233; *Massey v. Fisher*, 62 Fed. R. 958; *Kimmel v. Dickson*,

5 S. D. 221; *Boyer Ind. Dist. v. King*, 80 Iowa, 497; *People v. City Bank*, 96 N. Y. 32; *Leonard v. Lattimer*, 67 Mo. App. 138; *Stoller v. Coates*, 88 Mo. 514; *Harrison v. Smith*, 83 Mo. 210; *San Diego Co. v. Cal. Nat. Bank*, 52 Fed. R. 59; *State v. Thum*, 55 Pac. R. 858; *In re Johnson*, 103 Mich. 109; *Moreland v. Brown*, 86 Fed. R. 259; *Windstanley v. Second Nat. Bank*, 13 Ind. App. 544; *Anderson v. Pacific Bank*, 112 Cal. 598; *Wallace v. Stone*, 107 Mich. 190; *Anheuser-Busch Ass'n v. Morris*, 36 Neb. 31; and see especially for the principle the splendid judgment of Stanley Matthews in *Central Nat. Bank v. Life Ins. Co.*, 104 U. S. 54, and of Sir George Jessel in *Knatchbull v. Hallett*, L. R. 13 Ch. D. 696. Wherever the assets of the bank have been augmented by the trust fund, there must be a priority. *Beard v. School District*, 88 Fed. R. 375;

in the cases cited in the notes below. On the other hand, if the bank received the money without notice of its trust character, even though the depositor was acting in violation of the rights of the owner, the true owner has the right to pursue the fund through its various transmutations, as long as he can trace the fund into any specific collection of property.¹³ If the property is money, which has no "earmarks," as the courts say in the homely phrase borrowed from the patois of the agister of cattle, the owner can sue at law for money had and received,¹⁴ but in this way he would lose his claim upon any specific property, because the judgment at law could not preserve the lien upon the property into which the money went.¹⁵ But if the owner brings an equitable action, he impresses the trust upon the property into which his funds found their way. Since now the bank owns its assets, and since it is not a *bona fide* holder except for what it has paid out or appropriated without notice of the trust,¹⁶ it necessarily follows that the bank stands in the situation of any other holder of trust property who has obtained trust property with no right to hold it and has mingled it with property of his own. From the very nature of the case the bank assets must be considered as one fund in a constant state of change, where all the property of the bank is mingled together. The owner of the trust fund, therefore, who has never consented to the bank's acquisition of his property can claim a priority as a preferred charge or a lien upon the bank's assets of a higher character than the claim of any general creditor who has no lien, and on an equality with every other creditor with an equitable lien of the same description, for any balance of the fund which remained credited in the bank at the time it received notice of the trust character of the fund.¹⁷ But many courts deny

Wiggins v. Stevens, 53 N. Y. Supp. 90; Paul v. Draper, 73 Mo. App. 566; City Bank v. Blackmore, 75 Fed. R. 771. The last case states a correct principle and fails to properly apply it to the facts.

¹³ See cases cited in note 11, *supra*.

¹⁴ Keener, Quasi-Cont., 183 et seq.

¹⁵ He simply takes a claim for damages.

¹⁶ See § 136, *ante*.

¹⁷ See the principle stated in the

this obvious conclusion, and say that where the fund has become mingled with the assets of the bank there can be no preference.¹⁸ This conclusion violates well settled principles and is not sound. It ignores the very obvious suggestion, which is that it will be presumed that the banker in paying out moneys paid out his own funds.¹⁹ The difficulty really

cases in notes 11 and 12, *supra*. But some cases, not understanding the nature of bank transactions, confine the priority to cash on hand in the bank. *Merch. Nat. Bank v. School District*, 94 Fed. R. 705; *Bank v. Latimer*, 67 Fed. R. 27, on the theory that the bank drew out its own money; *State v. Foster*, 5 Wyo. 199.

¹⁸ See cases cited in note 6, § 342, *post*, for the Illinois citations, in note 23 to § 343, *post*, and in notes 6, 12 and 13 to § 344, *post*. Wisconsin, Illinois, Tennessee and perhaps Massachusetts are the main offenders. The Wisconsin cases are a queer illustration of the power of judicial obstinacy. In *McLeod v. Evans*, 66 Wis. 401; *Francis v. Evans*, 69 Wis. 115, and *Bowers v. Evans*, 71 Wis. 133, the court in opinions delivered by Chief Justice Cole, who with Chief Justice Dixon and Chief Justice Ryan has given the Supreme Court of Wisconsin a deservedly high standing, affirmed the correct principle; but Justice Cassoday, through an inability to understand that a transfer of credit in a bank is the same thing as the receipt of money, dissented. The Indiana court in *Windstanley v. Second Nat. Bank*, 13 Ind. App. 544, shows a like lack of comprehension in its criticism of these Wisconsin cases. But after three

decisions by a court it would have been supposed that a judge would have been willing to concede that he was probably wrong in dissenting. But in *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, through a new court, Justice Cassoday obtained his opportunity against a non-resident of Wisconsin. A Chicago corporation sent to a Wisconsin bank a draft on one Lemke. The Wisconsin bank collected the money and sent its check therefor upon a Chicago bank. The Chicago bank refused to pay the check. Every lawyer would concede that the unpaid check was not payment by the Wisconsin bank. The funds, therefore, remained in the Wisconsin bank as bailee. But because the Wisconsin bank had other dealings with the Chicago bank to a larger amount than the draft, Justice Cassoday in some mysterious way discovered that the Chicago firm's money had passed in those transactions, and that therefore the Wisconsin bank had gotten rid of the proceeds of the collection. The case needs but to be stated to show its unsoundness. The extraordinary decision in *Dowie v. Humphrey*, 91 Wis. 98, shows the necessary result of Justice Cassoday's perverted views of the law.

¹⁹ *State v. Foster*, 5 Wyo. 199; *Merch. Nat. Bank v. School Dis-*

arises from the fact that the courts will not forget that the only person who owns the assets of the bank is the banker, and the common phrase, "money in the bank," is really a reminiscence of that mediæval condition when the only relation that existed between a banker and his depositor was the relation of bailee and bailor, where the banker kept and returned the identical money. What would be thought of this doctrine applied to banks, if it were applied to an ordinary business man who had received trust moneys into his hands as the wrongful or gratuitous depositary of them, and had merely mingled the money with his own, and then acquired other property with it? Would any court hesitate to impress a trust upon the property, simply because the man was in debt? Yet this is what these holdings as to mingling amount to. If the banker mingles the fund with his own, knowing its trust character, he perpetrates a wrong. If he does it without knowledge his wrong is not malicious, but it is none the less an injury to the innocent owner, and a violation of his rights. The viciousness of this rule becomes apparent when it is applied to those banks which accept and execute trusts. Here the bank is an express trustee, and assumes all the duties of a trustee. It may be that it is an executor, or an administrator or a trustee by deed or by will. It is required, no doubt, to deposit securities for the protection of its creditors, but those securities are not equal to the amounts which the corporation may receive in trust. Sometimes, and no doubt always in carefully-managed com-

trict, 94 Fed. R. 705. But the rule ought to be that the assets of the bank are a fund, and the bank ought not to be permitted to claim that such assets are not impressed with a trust. The opposing cases seem to be governed by the wholly illogical idea that a bank as trustee can have greater rights than any other trustee, simply because it has a larger number of creditors.

These mingling decisions are a weak pandering to larger numbers, by allowing the many general creditors of a bank to have greater rights than the bank itself can claim. Certainly it would be absurd to say that a man could take another's money wrongfully and mingle it with his own and say he owned it all.

panies, the securities of the trust department are kept separate from the assets of the banking department. But the moneys of the trust department from the necessity of the case must go into the general assets of the bank, and be taken from those assets and loaned. The moneys of the various trusts, of necessity, are mingled with the general bank funds, although it is likely each trust may be credited with the moneys received into the bank from it. But at any rate they become and are mingled with the general funds of the bank. If now such a banking and trust company should fail, those courts which hold that the priority of the owner of the trust fund is lost upon mingling would be compelled to hold that the trust creditors had no priority over the general depositors in the bank. It would not help the matter under these decisions for the bank officers, anticipating a failure to take the amount of the trust deposits out of the funds of the bank and put them in a separate place, properly marked, because such an act would be a fraudulent preference where preferences are forbidden. If those general bank creditors were trust depositors also, as they are in some savings banks, which are run not in the interest of stockholders, but in the interest solely of the depositors, there would be no priority for one trust claimant over another, as one case has held.²⁰ But where there are two departments, one a commercial banking department and the other a trust department, the claims of general depositors meet those of trust claimants. The trustee has mingled the funds with his own money. Could these courts be consistent and hold that the general creditors of a trustee were on the same level as the beneficiaries for whom he was trustee? If those courts would not so hold they would confess the unsoundness of their doctrine. The conclusion is, then, that where the beneficiary or real owner of the fund is not in some way a party to the deposit of his funds in the bank, he has a priority for the balance of his account, being whatever has not been rightfully paid out or appropriated by the bank without notice of his claim.

²⁰ Vail v. Newark Sav. Inst., 32 N. J. Eq. 637.

§ 342. **Special depositors' priority.**—As we have already seen, certain transactions with a bank create special or specific deposits,¹ the essence of the transaction being that the relation created is that of bailor and bailee. The characteristic of the relation of bailment is that the title in the thing bailed remains in the bailor, although the bailee can assert ownership against every one but the bailor. The relation has been sometimes called a common-law trust, and, as we shall hereafter point out,² the origin of the relation is precisely the same in the history of

“That codeless myriad of precedent,”

which is called the common law. While the bailor has his remedy at law, he also has a remedy in equity, wherever his property in violation of the terms of the bailment has been converted by the bailee, the equitable remedy arising out of the trust character of the relation. The essence of this relation, judged from the equitable standpoint, is that the property came rightfully into the possession of the bailee, but without any authority or right in the bailee to mingle the thing bailed with his own property, and thus convert his bailor into his general creditor. If the bailee, the bank, does mingle the money bailed by a special or specific deposit, the bank at once commits a breach of trust and becomes responsible as trustee, and the case is one merely of a mingling by the trustee of his beneficiary's funds with his own, such as was spoken of in the last section, and the bailor, the special depositor, gains a priority over the general creditors for the amount of his property improperly mingled with the fund.³ The following are illustrative cases: Money paid into a bank for a specific and special purpose becomes a special deposit,⁴ and if mingled with the funds of the bank

¹ See §§ 162, 163, *ante*, and § 136, *ante*, notes 14 and 15. illegally put into the bank a priority. See note 12, § 341, *ante*.

² See the next section.

⁴ See §§ 162, 163, *ante*, and § 136,

³ Every case that gives a special depositor a priority is an authority for giving the owner of a trust fund *ante*, notes 14 and 15; and *Moreland v. Brown*, 86 Fed. R. 257; *Montague v. Pacific Bank*, 81 Fed. R. 602; In

the whole of the assets become impressed with a trust in favor of the special depositor;⁵ yet this proposition has been denied in some cases,⁶ and in another case has been limited to the cash on hand.⁷ But if the bank makes a purchase for a customer, and the customer pays money into the bank for the purchase, no priority results.⁸ Money received by a bank for the purpose of transmitting it is a special deposit, and the special depositor has a priority.⁹ Money deposited in a bank to secure the bank for becoming surety upon a bond gives a priority.¹⁰ It is needless to say that the special depositor may waive his right to claim that he had a special deposit, but he does not do so by taking a draft for a part of it, when he was induced to do so by false representations by the bank.¹¹ If the special deposit is actually kept separate, the depositor has, of course, the right to the particular thing,¹² but he has no priority where the banker has promised to put his deposit in a separated condition but has not done so.¹³

§ 343. Proceeds of collections as a priority.—In discussing the nature of the undertaking assumed by a bank upon the deposit of paper for collection, it was pointed out that, when paper requiring collection is deposited, the transaction might be a sale to and a purchase by the bank of the paper. In such a case there is no doubt that if the transaction was really a sale or was so treated by the parties, it will be held

re Johnson, 103 Mich. 109; Harrison 890. There was no intention here
v. Smith, 83 Mo. 210; Stoller v. to make a special deposit.
Coates, 88 Mo. 514.

⁵In re Johnson, 103 Mich. 109. ⁹Moreland v. Brown, 86 Fed. R.
And see notes 11 and 12 to preced- 257. And see Massey v. Fisher, 62
ing section. Fed. R. 958.

⁶Lanternman v. Travous, 73 Ill. 598.
App. 670, citing other Illinois cases.

⁷Merchants' Nat. Bank v. School ¹¹In re Johnson, 103 Mich. 109.
District, 94 Fed. R. 705. And see ¹²In re Commercial Bank, 2 Ohio
National Bank v. Lattimer, 67 Fed. Dec. 304.
R. 27.

⁸Downing v. Lillyett, 36 S. W. R. ¹³See §§ 162, 163, *ante*. And see
Bayor v. Am. Trust and Sav. Bank, 157 Ill. 62.

to be a sale,¹ and as to the proceeds the bank's liability as upon a general or a special deposit must be ascertained in accordance with the rules stated in the preceding section and the sections to which it refers. But where the deposit is actually a deposit of the paper and not a sale, the rights of the parties are determined by the nature of the transaction. The deposit may be simply for credit, or it may be simply for collection, or for collection and credit. If for collection solely, the proceeding is a bailment, and upon receipt of the proceeds the bank may credit the proceeds to the depositor,² if there be no special contract requiring another action.³ If the bank is bound by an understanding either to hold the proceeds as the property of the depositor, if it does credit them the depositor has a priority in the assets to the extent of the proceeds.⁴ If the bank is not bound by such an understanding arising either from the express agreement of the parties or a general course of dealing between them, the bank may credit the proceeds to the depositor and he becomes merely a general creditor.⁵ Until the proceeds are so received and credited, the proceeds as between the collecting bank and the depositor are still the property of the depositor,⁶ and if the bank receiving the deposit becomes insolvent, the proceeds not having been received and credited, the power of collection in that bank ceases, and the depositor has a priority for the funds if they come into the custody of the insolvent bank or its representative,⁷ or he may recover them from the correspondent

¹ Taft v. Quinsigamond Bank, 52 N. E. R. 387.

² See §§ 133 and 188, *ante*; Henderson v. O'Connor, 106 Cal. 385.

³ See the references in preceding note and Continental Bank v. Weems, 69 Tex. 489; Peak v. Ellicott, 30 Kan. 156; Ellicott v. Barnes, 31 Kan. 170.

⁴ See the references in notes 2 and 3 preceding, and Wallace v. Stone, 107 Mich. 190; Griffin v.

Chase, 36 Neb. 328; First Nat. Bank v. Sanford, 62 Mo. App. 394; Anheuser-Busch Ass'n v. Morris, 36 Neb. 31; People v. Dansville Bank, 39 Hun, 187; Hunt v. Townsend, 26 S. W. R. 310.

⁵ Anheuser-Busch Ass'n v. Clayton, 56 Fed. R. 759. And see §§ 133, 187, 188, *ante*.

⁶ See §§ 133 and 188, *ante*.

⁷ Evansville Bank v. Germ. Am. Bank, 155 U. S. 556; Beal v. Somerville, 50 Fed. R. 647.

bank,⁸ or if no collection is made from the party liable that party still remains liable.⁹ If it be a correspondent bank, which becomes liable by reason of having the proceeds of the collection in its custody, he may claim a priority in the funds of that bank if it has received money,¹⁰ or he may claim the particular thing which it has received,¹¹ *provided* that bank has no lien upon the proceeds by reason of advances upon it,¹² or credit given upon it,¹³ or by reason of a set-off which it has against the transmitting bank by a course of dealing.¹⁴ But in those jurisdictions which recognize that the correspondent bank is the agent of the transmitting or primary bank, he may hold the latter liable for its agent's default;¹⁵ but if the latter bank is also insolvent, he has only the claim against the latter bank of a general creditor,¹⁶ where that bank has not received the proceeds either by credit to it or set-off against it.¹⁷ But in those states which maintain that the correspondent or secondary bank is not the agent of the transmitting bank, but the agent of the

⁸ *Evansville Bank v. Germ. Am. Bank*, 155 U. S. 556.

⁹ This, of course, must be the result. There is no payment. *Crane v. Fourth Street Bank*, 173 Pa. 556, carries this idea too far, for there was a payment.

¹⁰ See §§ 187, 188, 189 and 190, *ante*, and *Commercial Bank v. Armstrong*, 148 U. S. 50; *-Beal v. Somerville*, 50 Fed. R. 647.

¹¹ See *Levi v. National Bank*, 5 Dill. 104. This applies even to a deposit for credit.

¹² See § 189, *ante*. This only can apply as to a deposit for credit. Where the indorsement is to the first bank for collection the second bank has no claim.

¹³ The form of the indorsement is notice to every other bank that the collection does not belong to the first bank. *Evansville Bank v.*

Germ. Am. Bank, 155 U. S. 556. See § 189, *ante*. This only can apply as to a deposit for credit. See the preceding note.

¹⁴ See § 189, *ante*, and *Comm. Bank v. Armstrong*, 148 U. S. 50; and see the preceding note.

¹⁵ See § 181, *ante*, for those jurisdictions. The transmitting bank could claim the priority unless cut off by the insolvent bank's set-off or lien.

¹⁶ This follows because his claim is simply one for damages.

¹⁷ If the bank has received the proceeds by credit to it or set-off against it; the money has been received by it, and the depositor has a priority or has the claim of a general creditor as determined by his contract with it. See notes 4 and 5 to this section.

owner of the collection,¹⁸ the rights of the owner over the collection, where the proceeds are in the hands of a secondary bank, insolvent, can be secured for a priority, if the transmitting bank can claim a priority, which it can do where it has indorsed the paper for collection,¹⁹ or the owner himself can claim a priority in the funds of the secondary bank, where his indorsement to the primary bank was merely for collection.²⁰ But while the true rule is that the owner of the collection indorsed merely for collection²¹ can insist upon his priority whenever the proceeds have come to and remain in the hands of an insolvent bank,²² still some jurisdictions maintain the mistaken doctrine that if those funds have been mingled with the general assets of the bank there can be no priority.²³ The incorrectness of this doctrine has already been pointed out.²⁴ The third case is a collection indorsed to a bank for credit of the depositor or for collection and credit; the two cases do not differ. The relation established by such a transaction is a bailment to collect the money and deposit it to the credit of the depositor.²⁵ As soon as that collection is made and the proceeds credited, the depositor is a general creditor of the bank which received the paper for collection.²⁶ But until that time he is

¹⁸ See § 181, *ante*, for those states.

¹⁹ This is the custom. But if the indorsement is for collection and credit by the first bank to the second bank, and the second bank fails with the proceeds in its hands, the first bank is a general creditor, but the owner of the collection can hold the first bank.

²⁰ See § 188, *ante*, and cases in note 4, *supra*.

²¹ This applies as between the owner and the primary bank, where that is insolvent. The same principle applies as between the primary bank and the secondary bank, where the latter is insolvent, with the proceeds in its hands.

²² See note 8, *supra*.

²³ *Phila. Nat. Bank v. Dowd*, 38 Fed. R. 172; *State v. State Bank*, 5 Baxt. 1; *Ill. Trust & Sav. Bank v. First Nat. Bank*, 15 Fed. R. 858; *Burnham v. Barth*, 89 Wis. 362; *St. Louis Brew. Ass'n v. Austin*, 100 Ala. 313. Some courts limit the priority to the bank's cash. *Nat. Bank v. Lattimer*, 67 Fed. R. 27.

²⁴ See § 341, note 12; *Bowers v. Evans*, 71 Wis. 133 (now wrongly overruled); *Windstanley v. Second Nat. Bank*, 13 Ind. App. 544.

²⁵ See § 133, *ante*.

²⁶ See §§ 133, 187 and 188, *ante*.

not a general creditor. If the proceeds reach that bank after its insolvency, its power to collect being ended, the owner of the collection has a priority upon the funds of the bank.²⁷ If the funds are in the hands of a correspondent bank he may claim them from that bank as a priority if it is insolvent,²⁸ *provided* that bank has no lien upon the proceeds or right of offset against the bank transmitting to it.²⁹ In this latter case he may hold the bank in which he deposited for its agent's default in most jurisdictions,³⁰ but in other jurisdictions he cannot;³¹ but the primary bank having received the deposit by set-off or credit, he has the right to recover from it; but if it is insolvent, he is merely a general creditor.³² But in some states the rule is held that a deposit for credit passes title in the paper to the bank, where the depositor has the privilege of checking against it,³³ and hence the depositor in such case becomes a mere general creditor of the first bank upon the deposit.³⁴ He could not reach the proceeds in the hands of a correspondent bank³⁵ so as to

²⁷ *Beal v. Somerville*, 50 Fed. R. 647, 5 U. S. App. 14.

²⁸ *Evansville Bank v. Germ. Am. Bank*, 155 U. S. 556. In this case the form of the indorsement was not for credit, but for collection, yet the court recognizes the principle. The case cited in the last note states the principle in its best form.

²⁹ See notes 12, 13 and 14 to this section.

³⁰ See § 181, *ante*.

³¹ See § 181, *ante*.

³² This is said on the assumption that the deposit was simply for credit without there being any course of dealing or understanding to control the effect of the indorsement. See § 188, *ante*. But if the credit be given by the secondary to the primary bank, it is an absolute nullity, if that bank had notice of

the preliminary bank's insolvency. If it had not notice the owner can claim the proceeds from that bank in spite of the credit. *Germ. Am. Bank v. Third Nat. Bank*, 5 Dill. 104; *Evansville Bank v. Germ. Am. Bank*, 155 U. S. 556; *Beal v. Somerville*, 50 Fed. R. 647; *Jones v. Kilbreth*, 49 Ohio St. 401. Or he can claim the remittance received. *Beal v. Somerville*, *supra*.

³³ See § 133, *ante*.

³⁴ This rule places the depositor in the situation that if the second bank fails the primary bank has the priority. If the primary bank fails it has a claim in full against the secondary bank, but the depositor is only a general creditor of the primary bank, and all the time the collection, if not made, can be charged back against him.

³⁵ He has no title.

claim any priority at all. In such jurisdictions, if the correspondent bank fails with the proceeds of a collection in its custody, the transmitting bank must enforce the priority against the correspondent bank.³⁶ In such cases also the doctrine is held by some courts that the proceeds of the bank upon being mingled with its general funds lose their right of priority, and in consequence the person or bank claiming the priority becomes a mere general creditor.³⁷ But the better rule is otherwise even as to bailments, because a bailment presents a case of a fiduciary relation giving rise in equity to a trust.³⁸

§ 344. Deposit in insolvent bank as a priority.—The act of a banker in keeping open his bank for the reception of deposits when he knows his bank is insolvent is a gross fraud, as such an act is on the part of an incorporated bank whose officers know that it is insolvent.¹ In such a case, by reason of the fraud, the bank obtains no title in equity and becomes a constructive trustee.² The case then becomes one of those mentioned in the former section upon trust funds, and is governed by the same rules.³ But it must appear that there was actually a deposit after insolvency, for if a general depositor is induced by the fraudulent representation of the bank officers to allow his general deposit to remain, he does not acquire the rights of a depositor on

³⁶ See the preceding note.

³⁷ See cases in note 23 to this section.

³⁸ *Evansville Bank v. Germ. Am. Bank*, 155 U. S. 556; *Knatchbull v. Hallett*, L. R. 13 Ch. D. 696.

¹ *Importers' & Traders' Bank v. Peters*, 123 N. Y. 272; *Peck v. First Nat. Bank*, 43 Fed. R. 357; *St. Louis & San Francisco Ry. Co. v. Johnston*, 133 U. S. 566; *Furber v. Stephens*, 35 Fed. R. 17; *City of Somerville v. Beal*, 49 Fed. R. 790; *Wasson v. Hawkins*, 59 Fed. R. 233; *Lake*

Erie R. Co. v. National Bank, 65 Fed. R. 690; *American Trust Bank v. Gueder Mfg. Co.*, 150 Ill. 336; *Terhune v. Bank of Bergen Co.*, 34 N. J. Eq. 367; *Francis v. Evans*, 69 Wis. 115; *Bowers v. Evans*, 71 Wis. 133; *Comm. Ex. Nat. Bank v. Solicitors' Trust Co.*, 188 Pa. 330; and see §§ 187, 188, *ante*.

² See cases cited in preceding note.

³ See § 341, *ante*, and *Atkinson v. Rochester Printing Co.*, 114 N. Y. 168.

insolvency.⁴ But if there be a deposit made after insolvency, it makes no difference whether it be a deposit of paper requiring collection,⁵ or a deposit of money; if the bank is known to its officers to be insolvent, a trust results.⁶ The depositor has the right to reclaim the money from the bank as a special deposit, or if it has become mingled with the bank's property he has the right to claim a priority in the assets.⁷ If it be a deposit of paper for collection, he may follow the proceeds until they come to the hands of a *bona fide* holder, which would be a bank having the right to retain them, as explained before;⁸ but if the proceeds come back to the insolvent bank by credit to it, whether before its suspension⁹ or afterwards,¹⁰ he has the right to claim those proceeds as a priority upon the assets of the insolvent bank.¹¹ But here again we are confronted with the ruling of certain courts that the mingling of the proceeds with the assets of the bank reduces the depositor to the condition of a general creditor,¹² and the erroneous ruling of other courts that a mere shifting of credit does not augment the assets of an insolvent bank.¹³ This latter position seems so wholly

⁴ Venner v. Cox, 35 S. W. R. 769.

⁵ Importers' & Traders' Bank v. Peters, 123 N. Y. 272.

⁶ Klepper v. Cox, 97 Tenn. 534; Friberg v. Cox, 97 Tenn. 550; Wilson v. Coburn, 35 Neb. 530; Bruner v. First Nat. Bank, 97 Tenn. 540; Philadelphia Nat. Bank v. Dowd, 38 Fed. R. 172. All these cases recognize the creation of the trust, but make a wrong application of the doctrine of mingling, and are good reading by way of horrible examples. The presumption is that the officers knew the bank's condition. Craigie v. Hadley, 99 N. Y. 131; Rochester Printing Co. v. Loomis, 45 Hun, 93, 120 N. Y. 659. But Williams v. Cox, 37 S. W. R. 282, fails to notice the point.

⁷ St. Louis & San Francisco Ry. Co. v. Johnston, 133 U. S. 566; Francis v. Evans, 69 Wis. 115; Bowers v. Evans, 71 Wis. 133; Wasson v. Hawkins, 59 Fed. R. 233; and see cases cited in note 12 to § 341, *ante*.

⁸ See § 189, *ante*.

⁹ This cannot change the relation.

¹⁰ The identical thing can then be ascertained, and replevin lies for it. Comm. Ex. Nat. Bank v. Solicitors' Trust Co., 188 Pa. 330.

¹¹ See citations in note 7.

¹² See cases cited in note 6, and Blake v. State Bank, 12 Wash. 619; Nonotuck Silk Co. v. Flanders, 87 Wis. 237, overruling previous cases correctly decided. See note 18, to § 341, *ante*.

¹³ Beard v. Independent District,

indefensible that it is hardly credible. As a matter of fact, almost the whole of banking transactions between banks is a mere shifting of credit. It is just the purpose that banks exist for. And a shifting of credit represents a transfer of money, just as well as if the money were actually transmitted. The right to claim the funds a trust is not waived by the fact that the claimant took a dividend upon his claim as a general creditor, where he was ignorant of the fact that he was entitled to a trust.¹⁴

§ 345. Public funds.—As we have seen, public funds rightfully deposited in a bank are not entitled to a priority,¹ but if the deposit was made contrary to law a trust results against the bank,² and this trust creates a priority upon the funds of the bank.³ If, however, the bank allows public funds to be appropriated to a purpose which it knows is illegal it becomes a constructive trustee,⁴ and the public is entitled to a priority for the amount of the money misap-

88 Fed. R. 375; *City Bank v. Blackmore*, 75 Fed. R. 771. If a bank cancels its debt to one person by giving another credit, how does the transaction differ from one where a man takes money out of the bank and gives it to another to pay his debt and that other thereupon deposits it in the bank? Even the case of *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, admits this to be the case. Other courts confine the priority to the cash on hand where there has been a mingling. Compare *Merchants' Nat. Bank v. School District*, 94 Fed. R. 705; *State v. Foster*, 5 Wyo. 199; *National Bank v. Lattimer*, 67 Fed. R. 27.

¹⁴In *re Johnson*, 103 Mich. 109; *Wallace v. Stone*, 107 Mich. 190.

¹See § 340, *ante*, note 5.

²*San Diego Co. v. Cal. Nat. Bank*,

52 Fed. R. 59. This decision by an accomplished lawyer is one of the best upon this subject. *State v. Thum*, 55 Pac. R. 858. Compare *State v. Midland Sav. Bank*, 71 N. W. R. 1011.

³See cases cited in last note. But *Merchants' Nat. Bank v. School Dist.*, 94 Fed. R. 705, confines the priority to the bank's cash. And see *Stevens v. Williams*, 91 Wis. 58.

⁴This is to be understood, according to some cases, if the bank misappropriates to itself the money, thereby increasing its assets. But if some one else than the bank receives the money the public has only the claim of a general creditor. See *Beard v. Independent Dist.*, 88 Fed. R. 375. This rule attempts to make a distinction where none exists.

propriated.⁵ Taxes due from the bank have been held to be entitled to priority.⁶

§ 346. Liens upon particular funds.—As we have heretofore noticed, liens existing at the time of insolvency upon particular assets of the bank are not affected by the insolvency.¹ So where the bank has not fraudulently drawn a check or draft upon a particular fund which the parties agreed or understood should be payable out of a particular fund, the check operates as an assignment of a portion of the fund corresponding to the check or draft,² and the holder of it has a priority as to that particular fund.³ Any other lienholder is entitled to insist upon his lien against the bank or its creditors or representative.⁴

§ 347. Statutory preferences.—Under one system, at least, the creditors of a bank are divided into classes, as note-holders, depositors, and creditors, and a preference upon the assets is given in the order stated to the respective classes. Under this system it is held that balances due banks are the claims of creditors, not depositors,¹ and the word “depositors” covers only general depositors, but not holders of certificates of deposit; the latter are creditors.² Under another system, savings banks as depositors are given a preference

⁵ See note 2, *supra*.

⁶ Taxes are necessarily preferred.

¹ See § 327, *ante*, notes 8 and 9. These liens may be legal or equitable in their nature. Liens at law are spoken of in the cases referred to in section 327. In the next note will be found cases where the liens were equitable. A right of set-off is equivalent in some instances to an equitable lien.

² *Coates v. First Nat. Bank*, 91 N. Y. 26; *Fourth St. Bank v. Yardley*, 165 U. S. 684; *First Nat. Bank v. Clark*, 134 N. Y. 368. But see *First*

Nat. Bank v. Dubuque Ry. Co., 52 Iowa, 387. But where a depositor obtains drafts by his checks, which drafts are not paid, he gains no lien upon the fund, nor does he become a special depositor entitled to a priority. *Jewett v. Yardley*, 81 Fed. R. 920.

³ See cases cited in preceding note.

⁴ See § 331, *ante*, note 6.

¹ In *re State Bank*, 13 Pa. Co. Ct. R. 433; *Appeal of Parkersburg Bank*, 6 Wkly. Notes Cas. 694.

² In *re State Bank*, 13 Pa. Co. Ct. R. 433.

upon the assets for any balance due to them,³ but this preference given by the state statute is not binding upon a national bank.⁴

³ *Rosenback v. Manuf. Bank*, 69 N. Y. 358; *In re Patterson*, 18 Hun, 221, 78 N. Y. 608. The savings bank was held to be a depositor, though interest was paid to it.

⁴ *Sixpenny Sav. Bank v. Stuyve-*

sant Bank, Fed. Cas. No. 12,919; *Davis v. Elmira Sav. Bank*, 161 U. S. 275, reversing 142 N. Y. 590. It is singular how frequently the Supreme Court reverses national bank cases from New York.

CHAPTER XIII.

ACTIONS AND JURISDICTION.

§ 348. **Summary remedy.**—In the days when banks were considered as the favored creatures of the law, a summary remedy was given to them in some states and jurisdictions. Especially in the early Alabama reports will be found a great deal of law upon this subject. Cranch's Circuit Court Reports are also thickly sown with cases upon this subject. The matter possesses only an antiquarian interest at the present day. These statutes permitted a judgment upon a bank's claims to be taken without pleadings,¹ but took away no defense that the maker of a note possessed.² They were held to apply only to paper acquired after the act was passed,³ and only to paper payable at the bank;⁴ but in some instances the remedy extended to all paper due the bank.⁵ The statute was required to be strictly followed,⁶ but one case held it to be remedial,⁷ and the right to exercise the remedy could not be had against the personal representative of a deceased debtor.⁸ Under special charters the bank could insist upon a right to an immediate trial,⁹ and could have special privileges as to waiver of proof of notice, demand and protest,¹⁰ which privilege applied to notes not made payable at the bank.¹¹

¹ *Lyon v. State Bank*, 1 Stew. 442; *Crawford v. Planters' Bk.*, 4 Ala. 313.

² *Bank of Columbia v. Sweeney*, 2 Pet. 671.

³ *Levert v. Planters' Bank*, 8 Port. 104.

⁴ See last case cited.

⁵ *Hancock v. Branch Bank*, 5 Ala. 440.

⁶ *Logwood v. Huntsville Bank*, 1 Minor, 23; *Levert v. Planters' Bank*, 8 Port. 104.

⁷ *Branch of State Bank v. Harrison*, 2 Port. 540.

⁸ *Murphy v. Branch Bank*, 5 Ala. 421; *Andrews v. Branch Bank*, 10 Ala. 375.

⁹ *Bank of Alexandria v. Young*, 1 Cranch, C. C. 458.

¹⁰ *Merchants' Bank v. Central Bank*, 1 Kelley, 418; *Mahone v. Central Bank*, 17 Ga. 111.

¹¹ *Donald v. Central Bank*, 3 Kelley, 185.

§ 349. **Matters of procedure.**—Certain miscellaneous matters of procedure are grouped in this section. In those states which gave the president the right to bring suit for the bank, it was held that he, as the bank, could sue or be sued,¹ under the allegation that he was the president of the bank,² or the bank itself could sue.³ A failure to file reports as provided by statute may prevent a bank from suing under a statute,⁴ but the statute will not be applied in a federal court.⁵ Service upon a bank must be had in accordance with the statute applicable in the jurisdiction. A garnishment may be properly served on the cashier,⁶ but the answer thereto should be made by the president,⁷ yet the cashier generally would have the same power. A garnishment may be had without first making a demand upon the bank.⁸ In a suit against an unincorporated association whose members are numerous, it is not necessary to serve all the members before judgment can be taken.⁹ A bank could formerly, where it had not the legal title to paper, sue in the holder's name to its use.¹⁰ But this matter is to-day of some importance in suing upon paper made to the cashier. The cashier's successor may sue upon it without an indorsement by the cashier,¹¹ and the bank itself may sue, certainly where the allegation is made that the paper was given to the bank in the name of the cashier;¹² or the cashier may sue in his own name to the use of the bank,¹³ or he may indorse to himself and sue

¹ *Hallett v. Harrower*, 33 Barb. 537; *Delafield v. Kinney*, 24 Wend. 345; *Thomas v. Dakin*, 22 Wend. 9; *Stanton v. Wilson*, 2 Hill, 153.

² *Hallett v. Harrower*, 33 Barb. 537.

³ *Leonardsville Bank v. Willard*, 25 N. Y. 574.

⁴ *Bank of British North Am. v. Improvement Co.*, 97 Cal. 28.

⁵ *Barling v. Bank of British North Am.*, 50 Fed. R. 260.

⁶ *Rosenberg v. First Nat. Bank*, 27 S. W. R. 897.

⁷ *Sturgis v. Rogers*, 26 Ind. 1.

⁸ *Birmingham Nat. Bank v. Mayer*, 104 Ala. 634.

⁹ *Mandeville v. Riggs*, 2 Pet. 482.

¹⁰ *Moore v. Penn*, 5 Ala. 135.

¹¹ *Dutch v. Boyd*, 81 Ind. 146; *Barney v. Newcomb*, 9 Cush. 46. The bank should sue where the real party in interest is required to sue. *Camden Bank v. Rogers*, 4 How. Pr. 63.

¹² See cases cited in note 15.

¹³ *O'Brien v. Smith*, 1 Black, 99; *Merchants' Bank v. McClelland*, 9 Colo. 608; *Johnson v. Catlin*, 27 Vt. 87.

upon it.¹⁴ An indorsement to the cashier as cashier is an indorsement to the bank, and may be so alleged;¹⁵ or if alleged to be indorsed simply to the cashier, the allegation is sufficient. The general rule as to pleading the existence of a corporation is applicable to banks. It is not necessary to allege the corporate character specifically,¹⁶ and if the plaintiff sues as a corporation the corporate character must be denied;¹⁷ and under common-law pleading the general issue might not put in issue the corporate character of the plaintiff, where the plaintiff sued as a corporation.¹⁸ Matters of evidence have been incidentally noticed in many places in the preceding sections. It remains to be said here that an indorsement upon a note of the sum for which it was discounted, and the date of the discount, is an admission binding upon the bank.¹⁹ A defense by a stockholder to a note to the bank is immaterial where it is based upon illegal proceedings whereby he lost a dividend upon his stock.²⁰ In an old case it was held that an action on the case against a bank did not lie for failure to pay over money which it had collected and credited.²¹ A judgment where all the parties liable are sued under a statute may be against any or all of the defendants.²² Proceedings supplementary to execution may be had against the officers of the bank, as holding property of the bank.²³ Statutes of limitation govern banks, unless they are exempted by statute or charter.²⁴ But it was held in Illinois that the state bank

¹⁴ *Young v. Hudson*, 99 Mo. 102.

¹⁵ *Bank of U. S. v. Davis*, 4 Cranch, C. C. 533; *Pratt v. Topeka Bank*, 12 Kan. 570.

¹⁶ *Ryan v. Farmers' Bank*, 5 Kan. 658; *Lewis v. Bank of Ky.*, 12 Ohio, 132.

¹⁷ *Ryan v. Farmers' Bank*, 5 Kan. 658, *semble*. See the next note.

¹⁸ See the conflicting authorities, 5 *Encyc. Plead. & Pr.* 77 et seq.

¹⁹ *Colgin v. State Bank*, 11 Ala. 222.

²⁰ *Whittington v. Farmers' Bank*, 5 Har. & J. 489.

²¹ *Tinkham v. Heyworth*, 31 Ill. 519. The bank here had the right to credit the owner of the collection. The language of the case goes far beyond anything necessary to be decided. The case shows a deposit for collection and credit, and is therefore correctly decided.

²² *Bussey v. Branch Bank*, 15 Ala. 216.

²³ *Ballston Spa Bank v. Marine Bank*, 18 Wis. 490.

²⁴ *Mahone v. Central Bank*, 17 Ga. 111. See the queer discussions of

was the state, and hence a statute of limitation did not run against it.²⁵ For the same reason it was held that ministerial agents of the bank sued with it were not liable for costs.²⁶ But in Arkansas the state bank was required to give a bond upon an injunctional order.²⁷

§ 350. Jurisdiction of courts over national banks.—

The law of June 30, 1864 (13 Stat. 99), and of June 3, 1866, carried into section 5198 and section 629 of the Revised Statutes, gave jurisdiction in cases relating to national banks to the state courts, and also to the circuit courts of the United States. The act of June 30, 1876, gave federal courts jurisdiction of equity suits where brought to enforce the statutory liability.¹ The act of July 12, 1882 (22 Stat. 163), restricted the jurisdiction of federal courts over national banks to such cases as those courts would have jurisdiction to entertain over individuals.² Cases involving usury by national banks were governed by sections 5197 and 5198, which gave concurrent jurisdiction to federal courts and to state courts;³ but by 22 Stat. 163, and by 25 Stat. 433, courts of the United States have jurisdiction in such suits only on the ground of diverse citizenship or the presence of a federal question; but an exception is made in 25 Stat. 436, as to cases for winding up the affairs of national banks. Therefore in suits for receivers, etc., the United States courts have the same juris-

the state's right to delegate its sovereignty in *Bank of Alabama v. Gibson's Adm'rs*, 6 Ala. 814, and also the case first cited in this note, which should be compared with the cases cited in the next two notes. It is interesting to conjecture what the Alabama court, in its then condition of mind, would have held as to the delegated power to condemn private property.

²⁵ *State Bank v. Brown*, 2 Ill. 106. See the last note.

²⁶ *Duncan v. State Bank*, 2 Ill. 262.

²⁷ *Ex parte State*, 15 Ark. 263.

¹ *Irons v. Manufacturers' Nat. Bank*, 17 Fed. R. 308.

² *Union Nat. Bank v. Miller*, 15 Fed. R. 703; *National Bank v. Fore*, 25 Fed. R. 209; *Price v. Abbott*, 17 Fed. R. 506. And see *Wilson Co. v. Third Nat. Bank*, 103 U. S. 770; *Commercial Nat. Bank v. Simmons*, 1 Flap. 449, for the rule.

³ *First Nat. Bank v. Morgan*, 132 U. S. 141. The defense of usury was governed by the same rule. *National Bank v. Eyre*, 52 Iowa, 114. See § 200, *ante*, for other authorities.

diction presumably which they had prior to the passage of 22 Stat. 163; but that is a close question, because 25 Stat. 436, left this particular jurisdiction over winding-up suits as it existed prior to its passage, and that jurisdiction was controlled by the statute of 1882 (22 Stat. 163), which had probably taken it away. To obtain a review of a usury case by the Supreme Court of the United States in error to the Supreme Court of the state, a claim of a right under a federal statute must be specially set up and claimed in the state court.⁴ The statute of July 12, 1882, has practically been incorporated into the act of 1887 (24 Stat. 373), amended and corrected in 1888 (25 Stat. 433), whereby the national banks are made citizens of the state where they are located, and the jurisdiction of the United States courts over them is dependent upon the diverse citizenship of the parties or the presence of a federal question.⁵ It is difficult to see what effect the exception as to winding-up suits has, for that jurisdiction was taken from the United States courts by 22 Stat. 163. Since a state court cannot issue an injunction against a national bank (see § 352, *post*), these suits are left in a very unsatisfactory condition. A national bank cannot, any longer, remove a case simply because it is a national corporation.⁶ Where jurisdiction is conferred by reason of diverse citizenship, the matter involved must reach the jurisdictional amount,⁷ which is \$2,000 by 25 Stat. 434. Non-residents may of course remove a suit to the federal court. But where a federal question is involved, the circuit courts of the United States have concurrent jurisdiction,⁸ and the suit may be re-

⁴ *Schuyler Nat. Bank v. Bollong*, 150 U. S. 85.

⁵ *Whittemore v. Amoskeag Nat. Bank*, 134 U. S. 527; *Petri v. Comm. Nat. Bank*, 142 U. S. 644; *Danahy v. National Bank*, 64 Fed. R. 148, 24 U. S. App. 351. The provision as to jurisdictional amount of \$2,000 governs.

⁶ *Leather Mfg. Nat. Bank v. Cooper*, 120 U. S. 778; *Wilder v.*

Union Nat. Bank, 9 Biss. 178,—a case wrongly decided as the law then was.

⁷ See cases cited in last two notes.

⁸ *Union Nat. Bank v. Miller*, 15 Fed. R. 703; *Auburn Sav. Bank v. Hayes*, 61 Fed. R. 911; *Walker v. Windsor Nat. Bank*, 56 Fed. R. 76, 5 U. S. App. 423. The suit may go on in the state court and be taken to the United States Supreme Court

moved upon that ground from the state court, provided the matter in dispute is \$2,000 or over. The receiver of a national bank being an officer of the United States may sue in the circuit court of the United States or in the district court,⁹ regardless of citizenship or of the amount involved. He may remove a suit against him from the state court upon this ground.¹⁰ The same rule applies to the agent of the stockholders after the termination of the receivership.¹¹ Either of these officers may sue or be sued in the state courts.¹² But the receiver must be really involved as to his rights directly and not remotely,¹³ and adversely to the party litigating. If he be merely a formal party, or joined because he holds the fund in litigation,¹⁴ the federal court does not thereby gain jurisdiction. The receiver is not estopped from asking a removal by causing himself to be substituted in an action in the state court.¹⁵ But where a national bank, as a going concern and not in the hands of a receiver, is a party, the rule applied to determine the jurisdiction of a United States court is precisely the rule that would be applied to any citizen of the state where it is located,¹⁶ unless in winding-up

where a federal question is specially raised. *Miller v. National Bank*, 106 U. S. 542.

⁹ *Yardley v. Dickinson*, 47 Fed. R. 835; *Price v. Abbott*, 17 Fed. R. 506; *Armstrong v. Ettlesohn*, 36 Fed. R. 209; *National Bank v. Crawford*, 69 Fed. R. 532; *Thompson v. Pool*, 70 Fed. R. 725; *Stephens v. Bernays*, 119 Mo. 143; s. c., 44 Fed. R. 642. A petition to compromise may also be brought in the federal court. In re *Platt*, 1 Ben. 534.

¹⁰ *School Dist. v. First Nat. Bank*, 61 Fed. R. 417; *Bartley v. Hayden*, 74 Fed. R. 913. *Contra*, *Bird v. Cockrem*, 2 Woods, 32.

¹¹ *McConville v. Gilmour*, 36 Fed. R. 277.

¹² *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Peters v. Foster*, 56 Hun,

607; *Thompson v. Schaetzel*, 2 S. D. 395; *Witters v. Sowles*, 61 Vt. 366.

¹³ *Le Sassier v. Kennedy*, 123 U. S. 521; *Van Antwerp v. Hulburd*, 8 Blatch. 282.

¹⁴ *St. Luke's Church v. Sowles*, 51 Fed. R. 609.

¹⁵ *Cadle v. Tracy*, 11 Blatchf. 101.

¹⁶ See cases cited in notes 2 and 5 to this section, and *Petri v. Comm. Nat. Bank*, 142 U. S. 644; *Danahy v. National Bank*, 64 Fed. R. 148, 24 U. S. App. 351. It may be worthy of note that the first United States Bank could not sue in the federal courts (*Bank of U. S. v. Devaux*, 5 Cranch, 85), but could on the ground of diverse citizenship of its officers. The second United States Bank was given the right. *Osborn v. Bank of U. S.*, 9 Wheat. 738.

suits a jurisdiction remains in federal courts. A national bank bringing suit in another state than the one where it is located may sue in the United States court on the ground of diverse citizenship, if it bring itself within the jurisdictional requirements.¹⁷ The method of alleging the residence of the bank is to allege its due organization and the place and state where located, but it has been held to be sufficient to describe it as of a certain city.¹⁸ But where a note was executed to a national bank, a denial on information and belief of its corporate existence in a suit on the note is frivolous.¹⁹

§ 351. What court of state or United States has jurisdiction.—The rule as to jurisdiction of the various federal courts in the act of 1888 is that the suit, where diverse citizenship exists, must be brought either in the district of the residence of the plaintiff or the defendant.¹ Hence a national bank could be sued in a United States court in another district than the one where it is located if a good service could be obtained. But section 629 of the Revised Statutes limits the district where a national bank may bring suit or be sued to the district where it is located.² That statute must be considered as modified by the later statute. But in equity suits to remove a cloud from title—and the principle would apply to all suits of a local nature—the United States court where the property is situated would have jurisdic-

¹⁷ *Manuf. Nat. Bank v. Baack*, 8 Blatchf. 137; *Petri v. Comm. Nat. Bank*, 142 U. S. 644. But see *First Nat. Bank v. Smith*, 6 Fed. R. 215; *Farmers' Nat. Bank v. McIlhaney*, 42 Fed. R. 801, wrong.

¹⁸ *Farmers' Nat. Bank v. Rogers*, 1 N. Y. Supp. 757. Compare *Third Nat. Bank v. Teal*, 5 Fed. R. 503.

¹⁹ *Huffaker v. National Bank*, 75 Ky. 237.

¹ See 25 Stat. 433. The decisions upon this point are the following:

McCormick v. Walthers, 134 U. S. 41, citing many other decisions, and *Bostwick v. American Finance Co.*, 43 Fed. R. 897. Therefore a national bank could sue a non-resident in the district either where the bank resides or where the non-resident resided. And the bank could be sued in its own district as well as where the plaintiff resided.

² If this statute is applied to suits against national banks it would conflict with the later statute.

tion, provided the parties were either of them non-residents, regardless of the fact as to whether either of them resided in the district where the property was situated.³ This covers cases where both are non-residents of the district but residents of different states, but it does not seem to cover the case where both are non-residents, but residents of the same state. Such was the holding of the courts as to suits against national banks, and it was decided that jurisdiction in another district was not gained by a service upon an officer of the bank in the foreign district.⁴ Where a national bank sues in a federal court it may sue the defendant in a transitory action in the district where he resides.⁵ But if the action is local in its nature it could only be brought in the district where the property was located, and if that was not the district wherein either the plaintiff or the defendant resided, it would seem to follow that the bank would be required to sue in the proper court of the state where the property was; but the courts have, as we have seen, held otherwise.⁶ If part of the defendants reside in one district in the state and part in another, the action, if not local, may be brought in either district.⁷ The act of congress of February 18, 1875 (18 Stat. 320), conferring jurisdiction on the state courts, gives it to the state, county or municipal court of the city or county where the bank is located.⁸ The same statute applies to suits for usury sued for as a penalty.⁹ A very remarkable judicial deliverance has denied the power of congress to impose upon the

³ See cases in note 6, *supra*.

⁴ *Maine v. Second Nat. Bank*, 6 Biss. 26. A state statute as to service upon a foreign corporation governs the federal courts. *Ex parte Schollenberger*, 96 U. S. 369.

⁵ *Manuf. Nat. Bank v. Baack*, 8 Blatch. 137.

⁶ *Dick v. Foraker*, 155 U. S. 404; *United States v. S. P. Co.*, 63 Fed. R. 481.

⁷ *Third Nat. Bank v. Harrison*, 3

McCrary, 316. If part resided in the state where the bank was located and part in another state, what then would be the case?

⁸ See Rev. Stat., § 5198. This statute was held to apply to suits by, as well as against, a national bank. This is now especially necessary, or a national bank could not sue a citizen of its own state at all.

⁹ Rev. Stat., § 5198.

courts of a state, called in the opinion a foreign jurisdiction, the duty of enforcing this penal statute against usury.¹⁰ But assuming that a state court will not refuse to take jurisdiction on any such wild and untenable ground, a suit for a usurious penalty must be brought in a state court at least having the requisite jurisdiction under the state laws. Where usury is insisted upon as a defense it may be set up in any court where the usurious contract is sued upon.¹¹ But as to other suits against national banks it is a vexed question whether the bank can be sued in any state court other than that of the district or county where it is located. One series of cases holds that as to actions transitory in their nature a national bank may be sued in any state court where service can be gained upon it, though it be the court of another state than the one where it is located.¹² But since the means of gaining jurisdiction by attachment upon non-residents has been wrested from the New York courts,¹³ such jurisdiction could be gained only by service upon an officer within the state, and such service, on principle, would be bad.¹⁴ But it would still remain the rule that within the state the national bank could be sued in transitory actions, under these decisions, in a county of the state other than where the bank is located.¹⁵ Other cases have strenuously contended that a national bank can be sued only in that state court which has jurisdiction in the district or county where the bank is

¹⁰ *Miss. River Tel. Co. v. First Nat. Bank*, 74 Ill. 217. The judge who delivered this opinion had the longest service on the bench of any judge who ever sat in the Illinois Supreme Court. How he came to make such an incomprehensible decision, and why the other judges concurred, is a mystery.

¹¹ See § 200, *ante*.

¹² *Cooke v. State Nat. Bank*, 52 N. Y. 96, which contains some amusing ratiocination in regard to the power of congress; *Robinson v. National Bank*, 81 N. Y. 385; *Holmes v. Wilmington Nat. Bank*, 18 S. C. 31.

¹³ See the laconic submission in *Bank of Montreal v. Fidelity Nat. Bank*, 112 N. Y., 667; and see § 336, *ante*.

¹⁴ The officer would not be acting officially. See *Maine v. Second Nat. Bank*, 6 Biss. 26.

¹⁵ *Fresno Nat. Bank v. Superior Court*, 83 Cal. 491; *Talmage v. Third Nat. Bank*, 27 Hun, 61, 97 N. Y. 531. But this idea is abruptly dismissed by the Supreme Court of the United States (*First Nat. Bank v. Morgan*, 132 U. S. 141) with the short statement that so the law is, without any examination of the decisions.

located.¹⁶ The Supreme Court of the United States, whose decision controls, holds that if the action is local the national bank should be sued in the court that has jurisdiction, wherever that may be, but in all other cases the bank must be sued in the county or district where it is located.¹⁷ The opinion in note 15 to this section does not examine the cases upon the subject, but shortly says that the statute so provides. Yet if the objection to the jurisdiction is not raised in the lower court it is waived.¹⁸

§ 352. Injunctions and attachments against national banks.—No state court, under section 5242 of the Revised Statutes, can issue an injunction against a national bank prior to final judgment.¹ This would seem to cover any injunction against officers of the bank which would suspend the operations of the bank. But whether it would cover an injunction against a particular officer, not a managing officer, of the bank, who was enjoined from acting in the bank, is a matter of some doubt. Certainly the words of the statute do not cover such a case. But an injunction directed against the board of directors would be prohibited, as well as an injunction against the cashier or any general officer of the bank interfering with the operations of the bank. But a federal court may enjoin a national bank, and it may continue, after the cause is removed, an injunction improperly granted by a state court.² As we have already seen, an attachment against a national bank issued by any court is void.³

¹⁶ *Cadle v. Tracy*, 11 Blatch. 101; *Crocker v. Marine Nat. Bank*, 101 Mass. 240; *Miss. Riv. Tel. Co. v. First Nat. Bank*, 74 Ill. 217.

¹⁷ *Casey v. Adams*, 102 U. S. 66.

¹⁸ *First Nat. Bank v. Morgan*, 132 U. S. 141; *Lee v. Citizens' Bank*, 5 Ohio Dec. 21.

¹ See § 336, *ante*, and *Pacific Nat. Bank v. Mixter*, 124 U. S. 721; *Hower v. Weiss Malting Co.*, 55 Fed. R. 356, 14 U. S. App. 210.

² *Hower v. Weiss Malting Co.*, 55 Fed. R. 356, 14 U. S. App. 210.

³ See § 336, *ante*. If the federal courts have not jurisdiction of suits for winding up national banks under section 4, 25 Stat. 433, and if a state court cannot grant an injunction, it is difficult to see how a suit of that character can be successfully conducted, unless some stockholder who is a non-resident can be found to bring the action. See § 350, *ante*, as to this matter.

CHAPTER XIV.

SAVINGS BANKS.

§ 353. **The nature of savings banks.**—The original conception of a savings bank was a place where the savings of working people could be deposited and united so as to form loanable capital. The funds were managed without pay by officers who were philanthropic individuals, and the profits upon the capital earned went to the depositors. This was the original type of savings bank and it yet survives, except that the officers are generally paid a salary.¹ But there was certain to arise a kind of savings bank, where the profits, over and above a certain interest on the deposits, would go to the managers of the institution; and therefore there are savings banks which are regularly stocked corporations, where the deposit creates a debt and the stockholders are liable for the usual double liability upon their stock.² There are still other savings banks which have two kinds of depositors, those who become stockholders and those who are not.³ The peculiar nature of these banks has caused them to be separately noticed.

§ 354. **Illustrative cases on the nature of savings banks.**

Whether a bank is a savings bank or not depends upon its functions and not its name.¹ A savings bank which is authorized to do a commercial banking business is an ordinary commercial bank;² and a statute creating savings banks which were authorized to receive deposits and declare divi-

¹ *Huntington v. Savings Bank*, 96 U. S. 388. See the remarks made in the opinion.

² See *Queenan v. Palmer*, 117 Ill. 169, and *Ward v. Johnson*, 5 Bradw. 30, for this kind of a savings bank.

³ *Stockton v. Mechanics' Sav.*

Bank, 32 N. J. Eq. 163. But a better case is *Murphy v. Pacific Bank*, 119 Cal. 334.

¹ *State v. Lincoln Sav. Bank*, 82 Tenn. 42.

² *Mitchell v. Beckman*, 64 Cal. 117.

dends was held to be within a constitutional requirement which provided that any banking law establishing banks, whether of deposit, discount or circulation, should be approved by a vote of the people of the state. The constitutional provision was not confined to stockholders who owned the bank.³ A savings bank formed for the pecuniary benefit of its members is not a benevolent or charitable society.⁴ But if formed merely for the investment of money, and the payment of the income therefrom, it is a trustee, and a court of chancery may regulate the distribution of its assets,⁵ but it cannot change, any more than the legislature can change, the terms of the incorporating act.⁶ But even in ordinary savings banks the claim of the depositor is a chose in action—it is not a bailment.⁷ It is immaterial, where the bank has engaged to pay a certain interest, that it has invested in stocks which have depreciated.⁸ But the managers have no right to profits as such where the profits are divisible among the depositors.⁹ In savings banks the depositors are not stockholders¹⁰ unless the form of the organization makes them so; the relation of debtor and creditor arises in most savings banks upon a deposit¹¹ unless it be a special deposit.¹²

§ 355. Officers of savings banks.—The statutes are sometimes drawn so as to prevent an officer of a bank of circulation or deposit from becoming a director of a savings bank —

³ Reed v. People, 125 Ill. 592.

⁴ Shenn v. Mendenhall, 23 Minn. 92.

⁵ In re Newark Sav. Inst., 28 N. J. Eq. 552; Savings Inst. v. Makin, 23 Me. 360.

⁶ Dodd v. Una, 40 N. J. Eq. 672.

⁷ Lund v. Seamen's Bank, 37 Barb. 129; People v. Mechanics' Sav. Inst., 92 N. Y. 7; Ide v. Pierce, 134 Mass. 260; Pope v. Burlington Sav. Bank, 56 Vt. 284; Ward v. Johnson, 5 Bradw. 30.

⁸ Makin v. Inst. for Sav., 19 Me.

128; Makin v. Sav. Inst., 23 Me. 350.

⁹ Huntington v. Savings Bank, 96 U. S. 388.

¹⁰ Savings Bank v. New London, 20 Conn. 111.

¹¹ Ward v. Johnson, 5 Bradw. 30; and compare the cases in note 7, *supra*.

¹² Zinn v. Mendel, 9 W. Va. 580, *semble*. The bank is in such case bailee and is liable at law for a conversion. Davenport v. Underwood, 13 Am. Law Reg. (N. S.) 211 (Ky.).

an exceedingly wise provision; but a court is likely in such case to produce one of those convenient presumptions of which courts keep a liberal supply, to the effect that, if the director allows himself to be voted for, it will be presumed that he has resigned his other office.¹ The officers of the bank are selected generally by the board of trustees by majority vote;² but where the trustees are elected annually, and the officers are to be appointed during their pleasure, the office of treasurer is not an annual one.³ If the compensation of the officers is dependent upon net profits, a rise in the government securities owned by the bank has been held to be not a part of the profits.⁴ The officers being trustees are liable to the bank as are officers of other banks.⁵ If they make a loan to a greater amount than is permitted by the statute they are liable for the loss, although the statute fixes no penalty.⁶ Where a treasurer of a savings bank assigned to his bank a note and mortgage of lands not worth double the amount of the note as the law required, and without submitting the loan to the finance committee as required by the by-laws, he is liable irrespective of a failure on the part of the directors to repudiate the loan for so long a period as six years, and irrespective, too, of the knowledge of the directors.⁷ The treasurer is liable for permitting the funds of the bank to be used in making an unlawful and imprudent loan not submitted to the finance committee.⁸ The president is liable for loss upon an improvident loan made to him not authorized by or submitted to the finance committee.⁹ The treasurer is also liable where he signed the check for the loan.¹⁰ The purchase of realty which was not authorized by the charter and not submitted to the finance committee ren-

¹ *People v. Conklin*, 7 Hun, 188.

² See the last case cited.

³ *Commonwealth v. Reading Sav. Bank*, 129 Mass. 73, a suit on a bond.

⁴ *Jennery v. Olmstead*, 36 Hun, 536.

⁵ See § 79, *ante*, et seq.

⁶ *Thompson v. Greeley*, 107 Mo. 577.

⁷ *Williams v. Riley*, 34 N. J. Eq. 398.

⁸ *Williams v. McKay*, 46 N. J. Eq. 25. See § 79, *ante*, where the conclusions from this case are stated in the text.

⁹ See last case cited.

¹⁰ See last case cited.

ders liable for the loss those officers who took part in the transaction.¹¹ The treasurer who signed the checks therefor in blank is also liable.¹² All those officers who participate in making unlawful loans are liable for the loss thereon to the bank.¹³ For a release of securities on a loan by the president where the loan is to a manager, the president and manager are both liable.¹⁴ The secretary of the bank, who knew that a loan was unlawful, but acquiesced in it, must respond to the bank;¹⁵ but a director who took no part in the loan, but found out the fact after it was made, and made no objection, cannot be held.¹⁶ The trustees who act in good faith and with ordinary care and prudence in making a loan, on a mortgage are exempt from blame.¹⁷ If they are directly concerned in making unlawful loans they are, of course, responsible for the loss.¹⁸ Where an executive committee of the trustees is acting, they are liable for not exercising the proper control of the bank's affairs.¹⁹ But the managers are also responsible if they fail to bestow upon the affairs of the bank that reasonable care which the law requires of them, in consequence of which their associates are enabled to cause loss.²⁰ The habitual disregard by the president of the bank of the charter and the by-laws shows negligence in the managers.²¹ They are presumed to have failed to exercise ordinary care.²² Where money has been secretly withdrawn from the bank and covered by a system of false entries for a series of years, and the fact has not been dis-

¹¹ See last case cited.

¹² See last case cited.

¹³ *Paine v. Barnum*, 59 How. Pr. 303; *Williams v. McDonald*, 42 N. J. Eq. 392; *Knapp v. Roche*, 44 N. Y. Super. Ct. 247; *Hun v. Cary*, 82 N. Y. 65.

¹⁴ *Williams v. McKay*, 46 N. J. Eq. 25.

¹⁵ See last case cited.

¹⁶ *Knapp v. Roche*, 44 N. Y. Super. Ct. 247.

¹⁷ *Williams v. McDonald*, 37 N. J. Eq. 409.

¹⁸ See cases cited in note 13.

¹⁹ *Williams v. McKay*, 46 N. J. Eq. 25.

²⁰ *Wilkinson v. Dodd*, 40 N. J. Eq. 123, 42 id. 234, 42 id. 647; *Williams v. McDonald*, 42 N. J. Eq. 392.

²¹ *Williams v. McKay*, 40 N. J. Eq. 189.

²² See case last cited, reversing *Williams v. Halliard*, 38 N. J. Eq. 373.

covered by the executive committee or the board of trustees, who would have discovered it had they exercised reasonable diligence, they are bound to respond to the bank for the loss.²³ They cannot escape by averring that they did not know of the fact and had not time to give to the affairs of the bank.²⁴ But for single transactions they are not responsible if they were not otherwise negligent;²⁵ nor would they be liable for the first of a series of transactions by the president in disregard of the charter, if they could not reasonably have anticipated it.²⁶ For declaring unlawful dividends they can be held;²⁷ but if in regard to a particular transaction a trustee did not act he is not responsible for it, if he is not made liable on some other ground of failure to exercise care.²⁸ But a trustee is released for a loss where the loss is paid by a subsequent trustee.²⁹ And if a trustee gives the bank security to provide against loss upon a particular loan already made, he does not thereby become surety for money loaned to the bank.³⁰ The suit against the officers may be brought by the bank or its receiver.³¹ It may be at law where no accounting is necessary.³² But under one statute the state auditor alone can sue.³³ If, however, the bank and its receiver, or any other officer whose duty it is, refuses to bring the action, the creditors may sue, making the bank or the receiver and other officers parties.³⁴ The recovery belongs to the assets of the bank.³⁵ But the parties who profited by the improvident loans of the bank are not nec-

²³ *Williams v. McKay*, 46 N. J. Eq. 25; *Paine v. Irwin*, 59 How. Pr. 316.

²⁴ *Williams v. McKay*, 46 N. J. Eq. 25.

²⁵ See case last cited.

²⁶ See case last cited.

²⁷ *Van Dyck v. McQuade*, 57 How. Pr. 62.

²⁸ Compare *Hun v. Cary*, 59 How. Pr. 426, with s. c., 82 N. Y. 65.

²⁹ *Hun v. Van Dyck*, 26 Hun, 567, 92 N. Y. 660.

³⁰ *Best v. Thiel*, 79 N. Y. 15.

³¹ See §§ 79, 81, *ante*, and *Wilkinson v. Dodd*, 41 N. J. Eq. 566.

³² *Thompson v. Greeley*, 107 Mo. 577.

³³ *Ryan v. Ray*, 105 Ind. 101.

³⁴ *Chester v. Halliard*, 34 N. J. Eq. 341; *Maisch v. Savings Fund*, 5 Phila. 30, an excellent opinion by Sharswood, and *Leffman v. Flannigan*, 5 Phila. 155, an opinion by Hare. And see § 83, *ante*.

³⁵ *Chester v. Halliard*, 34 N. J. Eq. 341.

essary parties.³⁶ The question of negligence, where the acts are improvident but not forbidden by law, is a question of fact.³⁷ But even where the loans are illegal it seems that the officers would not be liable if they had misconstrued the charter, unless the act were foreign to the business of the bank.³⁸ Where a corporation is a fraud because organized by incorporators who are not the persons designated by the legislature, those officers who act are responsible personally to the depositors;³⁹ and such is the case where no corporation whatever is formed.⁴⁰ But trustees who did not accept office and act are not liable.⁴¹

§ 356. **Stockholders.**—Where the stockholders of a savings bank are bound upon their stock subscription in double the amount of the stock, the liability does not differ from that imposed upon ordinary bank stockholders; it is not a penalty or a forfeiture.¹ It has been held that the liability could not be enforced while the original stock subscription was unpaid.² The original stock subscription can be collected as in the case of any other corporation. It is an asset of the corporation which passes to the assignee of the bank;³ but while an assignee appointed by a court under a statute is in possession of the assets, it is held in one court that a creditor cannot maintain a creditor's bill.⁴ Where a savings bank is insolvent a court of equity may order all stockholders joined in an action which is brought for the determina-

³⁶ *Wilkinson v. Dodd*, 41 N. J. Eq. 566; *Paine v. Barnum*, 59 How. Pr. 303.

³⁷ *French v. Redman*, 13 Hun, 502. If the act is forbidden by law the question of the officer's negligence is immaterial. He is liable for the loss. *Williams v. McKay*, 46 N. J. Eq. 25.

³⁸ *Williams v. McKay*, 46 N. J. Eq. 25.

³⁹ *Leffman v. Flannigan*, 5 Phila. 155.

⁴⁰ *Ridenour v. Mays*, 40 Ohio St. 9.

As to proof of no incorporation, see *In re Gibbs*, 157 Pa. 59.

⁴¹ *Maisch v. Savings Fund*, 5 Phila. 30.

¹ *Queenan v. Palmer*, 117 Ill. 619.

² *Herron v. Vance*, 17 Ind. 595. And a joint action was held not to lie at law against all the stockholders.

³ See § 61, *ante*.

⁴ *Brown v. Folsom*, 62 N. H. 527. See also *Schoyer v. Creswell*, 3 MacArthur, 5.

tion of the stockholders' liability and a general settlement of the bank's affairs.⁵ But a petition by stockholders charging that the bank is insolvent and that assessments will be made upon the stock by officers for their own gain, but charging no fraud or breach of trust, is bad for want of equity.⁶

§ 357. Powers of the savings bank.—The usual purpose for which a savings bank is incorporated or formed is to loan money. It may loan upon real estate¹ and take security by way of mortgage upon land in another state. If it have power to discount notes, it may purchase them.² But frequently these banks are denied the power to discount.³ It may purchase and hold city warrants, if such paper is within the kinds of securities in which the savings bank is permitted to invest.⁴ But if it loan money on securities, it is doubtless investing its deposits in them.⁵ It may not purchase real estate unless it is given the power.⁶ Its subscription to stock in another corporation, where it has no funds to invest, is *ultra vires*.⁷ If it owns stock it may contract with a broker to sell it.⁸ But it has no power to indulge in purchases of cotton futures.⁹ By a power to give security for public moneys invested with it, it is not given power to

⁵ *Herron v. Vance*, 17 Ind. 595; *Raye v. Savings Inst.*, 14 Rich. Eq. 54.

⁶ *Gorman v. Guardian Sav. Inst.*, 4 Mo. App. 180.

¹ *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322. See also *Tishimingo Sav. Inst. v. Buchanan*, 60 Miss. 496; *Williams v. McKay*, 46 N. J. Eq. 25.

² *Pape v. Capitol Bank*, 20 Kan. 440. See also *Auburn Sav. Bank v. Brinkerhoff*, 44 Hun, 142.

³ *United Germ. Bank v. Katz*, 57 Md. 128.

⁴ *Aull Sav. Bank v. City of Lexington*, 74 Mo. 104.

⁵ *Duncan v. Maryland Sav. Inst.*, 10 Gill & J. 209. As to loans, see *Paine v. Barnum*, 59 How. Pr. 303; *Rome Sav. Bank v. Kramer*, 32 Hun, 270; *Erie Co. Sav. Bank v. Coit*, 104 N. Y. 532.

⁶ See § 122, *ante*.

⁷ *Franklin Co. v. Lewiston Inst.*, 68 Me. 43.

⁸ *Sistare v. Best*, 88 N. Y. 527.

⁹ *Jennison v. Citizens' Sav. Bank*, 122 N. Y. 135. The contract is immoral. The court should have put its decision on the ground that the contract was wholly illegal. See § 33, *ante*.

become surety on the bond of a school treasurer.¹⁰ It has the implied power to borrow money and make negotiable paper for the loan.¹¹ The contract, while it is insolvent, to resume business by receiving new deposits to be used only in paying checks upon new accounts is beyond its power.¹² But it may agree with a depositor to pay interest upon interest left in the bank as new principal.¹³

§ 358. *Ultra vires* acts.—If a savings bank makes a loan contrary to a statute,¹ or if it discounts a note without authority of law,² or if it receives a bond to enable it to continue its business,³ the various instruments can be enforced by the bank. The presumption will be indulged that an act is not unlawful until it is shown to be so.⁴ But one case holds that a bank carrying on an unlawful business by making a loan upon a discount does an unlawful act, and cannot recover in *quasi-contract*,⁵ but this ruling is not to be commended.⁶ Conversely, the bank cannot defend against a depositor's suit because the deposit was in excess of the limit allowed by law,⁷ nor can it defend against an unlawful loan where it has received the benefit.⁸ Such is the rule as to a special deposit,⁹ or upon a purchase by a broker where it receives the stock and the broker sues for his commission.¹⁰ But if the contract was forbidden by law because

¹⁰ *In re Miners' Bank*, 13 Wkly. Notes Cas. 370. be enforced as for a loan. *Pratt v. Eaton*, 79 N. Y. 449. See also *Pratt v. Short*, 79 N. Y. 437, and § 33, *ante*.

¹¹ *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. Law, 513.

¹² *In re Mutual Soc.*, 2 Hughes, 374.

¹³ *Heironimus v. Sweeney*, 83 Md. 146.

¹ *Farmington Sav. Bank v. Fall*, 71 Me. 49.

² *United Germ. Bank v. Katz*, 57 Md. 128.

³ *Hurd v. Green*, 17 Hun, 327; *Hurd v. Kelley*, 78 N. Y. 588. The same rule applies as to other banks. If the note is void, the security may

⁴ *Williams v. Imp. & Trad. Nat. Bank*, 44 Ill. App. 295.

⁵ *In re Jaycox*, 13 Blatch. 70.

⁶ See § 33, *ante*.

⁷ *Taylor v. Empire State Sav. Bank*, 66 Hun, 538.

⁸ *Heironimus v. Sweeney*, 83 Md. 146.

⁹ *Cogswell v. Rockingham Sav. Bank*, 59 N. H. 43.

¹⁰ *Sistare v. Best*, 88 N. Y. 527.

it was immoral, the bank having received nothing of value,¹¹ and in any case where it has received no property or thing of value under a contract, it may defend on the ground of *ultra vires*.¹² The rules of law applicable to savings banks do not differ from the ordinary rules applicable to these transactions stated in sections 27, 32 and 33, *ante*, which should be consulted. The liability of officers upon *ultra vires* acts is noticed in section 355, *ante*.

§ 359. Powers of officers.—The power of an officer as agent to represent and act for his bank has been fully examined in section 73, *ante*, and the following sections. Some peculiar instances as to savings banks will be stated here. The acts of the officers within the scope of their authority bind the bank, but the rule is held with strictness as to the authority. Thus, while a treasurer with authority assigns a note and mortgage, the bank is liable though he convert the proceeds;¹ he has no authority to execute a release,² or to transfer a promissory note,³ or to discount the notes of his bank.⁴ But he is presumed to have authority to take possession of land on which the bank holds a mortgage, where the possession is taken for the purpose of gathering a crop.⁵ But the authority of the treasurer to indorse a note may be inferred from the conduct of the trustees;⁶ but such inference is not warranted by the fact that he has indorsed before,⁷ or that the bank has voted to sell notes held by it,⁸ or that the by-laws impose upon the treasurer the duty of drawing all necessary papers.⁹ His act in forging and transferring books of deposit in order to repay sums of money

¹¹ *Jennison v. Citizens' Sav. Bank*, 122 N. Y. 135.

¹² *Greeley v. Nashua Sav. Bank*, 63 N. H. 145.

¹ *Whiting v. Wellington*, 10 Fed. R. 810.

² *Dedham Inst. v. Slack*, 6 Cush. 408.

³ *Holden v. Upton*, 134 Mass. 177.

⁴ *Fifth Ward Bank v. National Bank*, 48 N. J. Law, 513.

⁵ *Bangor Sav. Bank v. Wallace*, 87 Me. 28; and see § 101, *ante*, notes 1, 2.

⁶ *Chase v. Hathorn*, 61 Me. 505.

⁷ *Holden v. Phelps*, 135 Mass. 61.

⁸ *Bradlee v. Warren Sav. Bank*, 127 Mass. 107.

⁹ See last case cited.

borrowed or embezzled by him does not bind the bank.¹⁰ But where he is given power to release a mortgage, and he forged, by an alteration, the bank's record of the resolution so as to give him power to assign, the bank is bound to a *bona fide* assignee relying upon the record.¹¹ But the treasurer has the power to execute a power of sale in a deed by conveying to purchasers under order of the board of investment.¹² If authorized to extend a note, he may do so though it release a surety.¹³ He has no power to borrow money,¹⁴ nor pledge collaterals for the bank.¹⁵ The rule as to the powers of a cashier of a savings bank differs somewhat from the rule as to the cashier of a commercial bank,¹⁶ except where the savings bank is also a commercial bank. The president of a savings bank has no power to borrow money without authority;¹⁷ but where he is authorized to sell stock he may employ a broker.¹⁸ But where the governing authorities of the bank permit the president to represent himself as in charge of the savings department, deposits with him bind the bank.¹⁹ And the bank may ratify an unauthorized act, as by accepting a purchaser's deed of release, where the treasurer has executed the power of sale in a mortgage.²⁰ There is no ratification, however, where the treasurer undertook to release a party upon a joint and several note by becoming a party to a deed of assignment and the bank received dividends on the assignment, and the books containing the payment were certified as correct.²¹ A clerk in a bank cannot bind the bank by his agreement that a deposit shall not be withdrawn unless two certain persons are pres-

¹⁰ Commonwealth v. Reading Sav. Bank, 133 Mass. 16. The holders here could not claim to be *bona fide*.

¹¹ Commonwealth v. Reading Sav. Bank, 137 Mass. 481.

¹² North Brookfield Sav. Bank v. Flanders, 161 Mass. 335.

¹³ New Hampshire Sav. Bank v. Ela, 11 N. H. 335.

¹⁴ Fifth Ward Bank v. First Nat. Bank, 48 N. J. Law, 513.

¹⁵ See last case cited.

¹⁶ Zimmerman v. Miller, 2 Penny. 226.

¹⁷ See case cited in note 14, *supra*.

¹⁸ Sistare v. Best, 88 N. Y. 527.

¹⁹ Beckley v. Commercial Bank, 43 S. C. 528.

²⁰ See case cited in note 12.

²¹ Dedham Sav. Inst. v. Slack, 6 Cush. 408. The alleged ratification lacked the element of knowledge.

ent with the depositor.²² But where a bank receives a bond, and the entry thereof in the pass-book of the depositor states the fact, the bank cannot deny that it received the bond as the depositor's.²³

§ 360. The contract of deposit.—A savings bank does not pay money upon check, but upon production of the pass-book accompanied by an order of the depositor. Such banks have generally a by-law to the effect that the deposit will be paid only upon production of the pass-book, and that the possession of the pass-book will be considered proof of ownership of the deposit. Depositors are generally required to sign an agreement to this effect, and the by-law or agreement is always printed in the depositor's book. This by-law is a part of the contract of deposit.¹ The assent of the depositor to it may be express by signing a book kept for that purpose,² or it may be inferred from the retention without objection of the pass-book containing the printed rules.³ This rule was held even as against a depositor who could neither read nor write.⁴ This contract is also binding upon the bank. It cannot change its by-laws without notice where the by-laws require notice, and any change does not affect a depos-

²² *Riley v. Albany Sav. Bank*, 36 Hun, 513.

²³ *Zeugner v. Best*, 44 N. Y. Super. Ct. 393.

¹ *Heath v. Portsmouth Sav. Bank*, 46 N. H. 78; *Gifford v. Rutland Sav. Bank*, 63 Vt. 108; *Appleby v. Erie Co. Sav. Bank*, 62 N. Y. 12; *Levy v. Franklin Sav. Bank*, 117 Mass. 448; *Burrill v. Dollar Sav. Bank*, 92 Pa. 134; *Kummel v. Germania Sav. Bank*, 127 N. Y. 488. *Contra*, *Eaves v. Savings Bank*, 27 Conn. 229. But under this last case, if the rule had been conspicuously posted up it seems that the ruling would have been different.

² *Gifford v. Rutland Sav. Bank*, 63 Vt. 108.

³ Last case cited. But where the by-law requires the book to be signed, the last case holds that the assent may be expressed in some other way; but *Kress v. East Side Bank*, 21 N. Y. Supp. 652, holds that even a signature to the by-laws is not sufficient where the bank has not affirmatively complied with a statute requiring the by-law to be posted up.

⁴ *Geitelsohn v. Citizens' Sav. Bank*, 40 N. Y. Supp. 662; *Warhus v. Bowery Sav. Bank*, 5 Duer, 67; *Burrill v. Dollar Sav. Bank*, 92 Pa. 134. The statute seems to make the rules constructive notice.

itor until he is notified;⁵ and on principle, if the by-law is a part of the contract, it cannot change it at all as to a previous depositor without the assent of the depositor.⁶ If the by-law or rules require an order from the depositor, the bank is bound by the rule.⁷ If the by-law requires the order to be witnessed the rule is binding on the bank,⁸ and it is liable for money paid contrary thereto. But the by-law of the bank cannot discharge the bank from its own negligence. Whatever the by-law may be, though it says that all payments upon production of the book shall be valid, and though the depositor has assented thereto, nevertheless the bank must exercise reasonable care and caution in making the payment.⁹ This duty is fully discharged only by an active vigilance in the protection of the depositor's rights.¹⁰ This question of due care is for the jury to decide as a question of fact,¹¹ except that one case held, erroneously, that where the question was upon due care of the bank, and the bank had before it the genuine signature of the depositor, which differed from the signature upon the order presented, it was not necessary to submit to the jury the question whether the latter ought to have noticed the difference.¹² But the ruling is no longer authority, and is not given any credence in the lower courts of the same state.¹³ Another ruling in a Ver-

⁵ *Kimins v. Boston Sav. Bank*, 141 Mass. 33. The same contract continues for succeeding deposits until notice is given. The same rule applies in favor of the corporation in its internal affairs. *French v. O'Brien*, 52 How. Pr. 394.

⁶ *Kimins v. Boston Sav. Bank*, 141 Mass. 33.

⁷ *Kummel v. Germania Sav. Bank*, 127 N. Y. 488.

⁸ *People's Sav. Bank v. Cupps*, 91 Pa. 315.

⁹ *Kimball v. Norton*, 59 N. H. 1; *Kummel v. Germania Sav. Bank*, 127 N. Y. 488; *Aukenhausen v. Peo-*

ple's Sav. Bank, 110 Mich. 175; *Allen v. Williamsburg Sav. Bank*, 69 N. Y. 314; *Goldrick v. Bristol Sav. Bank*, 123 Mass. 320.

¹⁰ *Allen v. Williamsburgh Sav. Bank*, 69 N. Y. 314; *Kummel v. Germania Sav. Bank*, 127 N. Y. 488.

¹¹ *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58.

¹² *Appleby v. Erie Co. Sav. Bank*, 62 N. Y. 12. Two able judges dissented.

¹³ *Fricke v. German Sav. Bank*, 4 N. Y. Supp. 627; *Saling v. German Sav. Bank*, 7 N. Y. Supp. 642.

mont case did not leave a question of fact to the jury where the circumstances were suspicious.¹⁴

§ 361. Ownership of the deposit.—Deposits in savings banks are peculiarly prolific in questions as to the real owner of the deposit. Husband and wife often make deposits in the bank in their joint names, and the rule as to ownership when one dies is difficult to find. One case held such a deposit meant that the deposit belonged to the survivor.¹ But a deposit to the credit of “J., or wife B.,” was held to prove simply that each should have power to draw the money.² Another case says that such a deposit is payable to either or to the survivor, but not to the personal representative of one and the other equally.³ It is plain that the rule of survivorship ought to govern in such a case, and the deposit should belong to the administrator of the one last deceased. But where a deposit is in the joint names of two persons, not husband and wife, without any provision as to survivorship, no presumption as to survivorship ought to be indulged, and the case should be left to proof as to the respective portions of each depositor where one of them is deceased. In the absence of proof the deposit ought to be divided equally. Deposits are often made by one person in the name of another. In such a case evidence is always admissible to show the intention of the depositor in making the deposit.⁴ Thus, where a father made a deposit in his daughter’s name, evidence was admitted to show that he intended to make her trustee for him, because he already had in his own name as much money deposited as the law permitted.⁵ The question as

¹⁴ Gifford v. Rutland Sav. Inst., 63 Vt. 108. The man who drew the deposit could not sign his own name properly, yet the court says this was not a suspicious circumstance. It may not be so in Vermont, but it would probably be held to be elsewhere, even in Louisiana.

¹ In re Brooks, 5 Dem. Sur. 326.

² Burke v. Slaterry, 31 N. Y. Supp. 825.

³ Mulcahey v. Emigrant Sav. Bank, 62 How. Pr. 463. Compare In re Smith, 17 Abb. N. C. 78.

⁴ Northrup v. Hale, 72 Me. 275; Gerrish v. New Bedford Inst., 128 Mass. 159.

⁵ Brabrook v. Five Cent Sav. Bank, 104 Mass. 228. The case

to the ownership is complicated by the rule that the delivery of the bank-book is necessary in order to draw the deposit. So it is held that a deposit to the credit of one person as trustee for another, where the deposit is made by the first person, and the other was not cognizant of the deposit and did not receive the pass-book during the life-time of the depositor, was not a deposit owned by the beneficiary under this rule, although there was evidence to show that the depositor intended to create a trust.⁶ But these cases are wrong, because the by-law or rule is not intended to regulate deposits in trust, and at any rate the book is only necessary to the conveyance of the legal title. The cases holding the other rule are much to be preferred.⁷ But where a deposit is made payable to either of two or the survivor and no delivery of the book is made, the deposit is the property of the depositor.⁸ In these cases also the book ought to have been held merely evidence of the legal title, and the provision of survivorship ought to have created a trust unless there was parol evidence to rebut it. The court makes the mistake of considering the case one of gift. It ought to have been considered as a declaration of trust, just as if it were to the use of both during the life of both, then to

holds that the illegality in the contract could not be set up by the daughter, a stranger to it, nor was it an estoppel in her favor. In another case a deposit was made in an assumed name. *Davenport v. Savings Bank*, 36 Hun, 303. The refusal of the bank to pay the owner of the deposit was held to be unjustifiable, where he proved his ownership of the deposit by an affidavit and tendered the pass-book. But even if the bank had paid under such circumstances it is difficult to see how it would have been protected against the real

owner of the deposit, had the affidavit proven untrue.

⁶ *Clark v. Clark*, 108 Mass. 522; *Bartlett v. Remington*, 59 N. H. 364. Compare *Pope v. Burlington Sav. Bank*, 56 Vt. 284.

⁷ *Blasdel v. Locke*, 52 N. H. 238; *Boone v. Citizens' Sav. Bank*, 84 N. Y. 83; *Weaver v. Emigrant Sav. Bank*, 17 Abb. N. C. 82.

⁸ *Gorman v. Gorman*, 39 Atl. R. 1038 (Md.). The language of this opinion goes far beyond anything necessary to be decided. The parol evidence rebutted the trust and that ended the case. *Flanagan v. Nash*, 185 Pa. 41.

the use of the survivor.⁹ The trust is not executory, it is executed, and there remains nothing to be done in order to complete the declaration of trust. Surely the depositor need not say to himself, I deliver this book from myself to myself as trustee. Another case holds, however, that a deposit by a husband in his wife's name is not a deposit in trust for her;¹⁰ and in yet another case the same ruling was very properly made where the deposit was so made that either the husband or wife could draw it.¹¹

§ 362. **Transfer of deposit.**—As we have seen, the courts consider the matter of transferring the pass-book as controlling, where the pass-book is required to be produced for payment.¹ But the pass-book is not a document that is negotiable, nor would a title pass with the possession, as in the case of an instrument which is negotiable upon delivery, although the rule of the bank declares that a payment upon the book produced shall be a valid payment.² Singularly enough the courts give effect to part of the rule by holding the transfer of the book necessary to convey title, yet deny to the rule efficacy to make the pass-book negotiable. Yet the same courts which require a transfer upon the bank's books to convey the full legal title deny that such a transfer is necessary to convey the legal title in the case of certificates of stock made transferable only on the books. But it might be said that a pass-book obtained by fraud, when transferred to a *bona fide* purchaser, conveys a good

⁹ *Boone v. Citizens' Sav. Bank*, 21 Hun, 235; *Fowler v. Bowery Sav. Bank*, 47 Hun, 399.

¹⁰ *Fairfield Sav. Bank v. Small*, 90 Me. 546. Since there was evidence to create a trust, the form of the deposit being such evidence, this case is wrong in its language, although the decision is correct, since the trust was rebutted. But see *Kennebec Sav. Bank v. Fogg*, 83 Me. 374; *In re Smith*, 17 Abb. N. C. 78.

¹¹ *Brown v. Brown*, 23 Barb. 565. Compare *Gerrish v. New Bedford Inst.*, 128 Mass. 159.

¹ See cases cited in note 6 to last section, which ought not to have been considered as cases of transfer.

² *McCaskill v. Conn. Sav. Bank*, 60 Conn. 300; *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58. A by-law can not make the book negotiable. *Witte v. Vincent*, 43 Cal. 325.

title,³ on the theory that the transfer conveyed an equitable title and that the defense of *bona fide* purchaser would be good. But such a defense is good only in conjunction with a legal title. The delivery of the pass-book with the intention of transferring gives the transferee an equitable title.⁴ An assignment of the deposit noticed to the bank has the same effect.⁵ In either case the transfer is good against subsequent attachments or garnishments,⁶ and hence would be good as against a subsequent assignee, or an executor or administrator. The deposit is without doubt subject to garnishment,⁷ but the garnishment only reaches the interest that the debtor has in the deposit; and while the bank would, no doubt, be protected for recognizing a garnishment, if it had no notice of the depositor's assignment, yet the creditor obtains by the garnishment no more than the rights of his debtor,⁸ and the debtor, whether he has made a written assignment or not, has parted with all but the mere legal title.⁹ The rule is the same for an assignment as against an administrator.¹⁰ The assignee except by the aid of a statute cannot maintain an action in his own name,¹¹ but can sue in the name of his assignor or of his personal representative.¹² The rules of the bank cannot prevent gifts of the deposit *inter vivos*,¹³ or gifts *causa mortis*, and after notice of the donee's claim the bank cannot disregard his rights;¹⁴ nor when it has notice of assignment can it disregard the rights of the as-

³ See *McCaskill v. Conn. Sav. Bank*, 60 Conn. 300.

⁴ *Pierce v. Boston Sav. Bank*, 129 Mass. 425.

⁵ *Kingman v. Perkins*, 105 Mass. 111.

⁶ See case last cited and *Taft v. Bowker*, 132 Mass. 277.

⁷ *Nichols v. Schofield*, 2 R. I. 123, and cases cited in last two notes.

⁸ *Commonwealth v. Scituate Sav. Bank*, 137 Mass. 301; *Taft v. Bowker*, 132 Mass. 277; *Norton v. Piscataqua Ins. Co.*, 111 Mass. 532.

⁹ *Appeal of Guinan*, 70 Conn. 342; *Polley v. Hicks*, 50 N. E. R. 809;

Watson v. Watson, 69 Vt. 243.

¹⁰ *Foss v. Lowell Sav. Bank*, 111 Mass. 285.

¹¹ *Howard v. Savings Bank*, 40 Vt. 597.

¹² *Foss v. Lowell Sav. Bank*, 111 Mass. 285.

¹³ *Gammond v. Bowery Sav. Bank*, 15 Daly, 483. Compare *McNamara v. McDonald*, 69 Conn. 484.

¹⁴ *Walsh v. Bowery Sav. Bank*, 7 N. Y. Supp. 663.

signee, though another person presents the book with a subsequent assignment.¹⁵

§ 363. Payment of the deposit.—There are two rules of savings banks which have a bearing upon the question of payment. The first is that a payment upon the production of the bank-book shall be a good payment. This does not excuse the bank for paying negligently to one not entitled to payment.¹ The book may be lost or stolen, and if the bank pays to the holder of the book and is guilty of no negligence in not discovering the fraud of the holder of the book, the bank is exonerated.² The bank is not required to have the depositor identified,³ but if the circumstances are suspicious the bank ought to be required to do so. But if the law governing savings banks is not consistent with the by-law,⁴ or if the by-laws require an order from the depositor and the bank pays without an order,⁵ or pays upon an order not in the form required by the by-law,⁶ the payment is not good. If an order is presented which is forged, the bank officer must be vigilant in detecting the forgery;⁷ and generally it may be said that any circumstance which tends to show a want of that care and prudence which a banker under the circumstances ought to exercise will present a case for a jury to pass upon as a question of fact,⁸ whether the

¹⁵ McCarthy v. Provident Inst., 159 Mass. 527.

¹ See § 360, *ante*, note 9, and Clark v. Saugerties Bank, 62 Hun, 346.

² Sullivan v. Lewiston Sav. Inst., 56 Me. 507; Donlan v. Provident Inst., 127 Mass. 183.

³ Sullivan v. Lewiston Sav. Inst., 56 Me. 507. And see also Gifford v. Rutland Sav. Bank, 63 Vt. 108, a case palpably wrong. The court says that a man who failed to sign his own name properly, although he was not shown to have been at all deficient in penmanship, was not an object of suspicion.

⁴ Ackenhausen v. People's Sav. Bank, 110 Mich. 175.

⁵ Kummel v. Germania Sav. Bank, 127 N. Y. 488.

⁶ People's Sav. Bank v. Cupps, 91 Pa. 315.

⁷ Allen v. Williamsburgh Sav. Bank, 69 N. Y. 814, and case in note 5, *supra*.

⁸ Smith v. Brooklyn Sav. Bank, 101 N. Y. 58. See Appleby v. Erie Co. Sav. Bank, 62 N. Y. 12, which can no longer be considered an authority.

negligence be in not investigating the personality of the applicant for payment,⁹ or in not refusing to pay upon a suspicious signature.¹⁰ A valuable lesson was taught to bank officers by the holding that, where an alleged donee *causa mortis* sued the bank after it refused payment, and the proof showed that the donee's attorney had prepared the pleadings on both sides of the case and the referee's decision and paid all the costs, a case of *prima facie* negligence was presented.¹¹ This species of complaisance is too common with bank officers. It has been said that the negligence of the bank will not make it liable, where the depositor was also guilty of negligence in not notifying the bank of his loss.¹² One court recognizing the rule held that where the depositor was shot and grievously wounded by a robber who stole the pass-book, the depositor was not guilty of negligence, when he notified the bank the next day.¹³ The contention that he was negligent under the circumstances was worthy of the solemn advocacy of a chief of the French army at one of their court-martial travesties. But all these cases that hold the failure to notify contributory negligence, where the bank was negligent in paying, are judicial errors, for the simple reason that the negligence is not contributory. It is

⁹ Fox v. Onondaga Sav. Bank, 7 N. Y. Supp. 17; Allen v. Williamsburgh Sav. Bank, 69 N. Y. 814. Compare Wall v. Emigrant Sav. Bank, 64 Hun, 249.

¹⁰ Fricke v. German Sav. Bank, 4 N. Y. Supp. 627; Saling v. German Sav. Bank, 7 N. Y. Supp. 642; Wegner v. Second Ward Sav. Bank, 76 Wis. 242; Hagar v. Buffalo Sav. Bank, 31 N. Y. Supp. 448; Tobin v. Manhattan Bank, 26 N. Y. Supp. 14. Compare Gifford v. Rutland Sav. Bank, 63 Vt. 108, a wrong decision. See note 3, *supra*.

¹¹ Farmer v. Manhattan Sav. Inst., 60 Hun, 462. The burden of proof to show negligence is said to be on

the depositor. Israel v. Bowery Sav. Bank, 9 Daly, 507. *Contra*, Abramowitz v. Citizens' Sav. Bank, 40 N. Y. Supp. 385, is the better rule, for payment is an affirmative defense.

¹² Kelly v. Emigrant Sav. Bank, 2 Daly, 227. This is a decision by the lamented Cardozo, who once filled so large a place in the public prints, but there are other reasons for considering the case erroneous. See notes 14 and 15. Goldneck v. Bristol Sav. Bank, 123 Mass. 320; Levy v. Franklin Sav. Bank, 117 Mass. 448.

¹³ Wegner v. Second Ward Sav. Bank, 76 Wis. 242.

a settled rule of law that where a party has by negligence put himself in a position where he is injured by the negligence of another, his negligence is not contributory where the other party had the clear opportunity of avoiding committing the injury, but through negligence did not avoid the injury.¹⁴ Applying this rule to the case of the depositor, the bank had the chance of avoiding the payment had it exercised due care, and it is therefore liable.¹⁵ But if the real owner misleads the bank by his statements, he is estopped.¹⁶ If he is negligent in furnishing information to a person, who was thereby enabled to mislead the bank, his contributory negligence is then clearly a bar to his recovery, because it contributed to the injury and caused the bank's act.¹⁷ But it is more correct to call this a case of estoppel. The rule as to payment upon the production of the pass-book ceases on the death of the depositor.¹⁸ Either upon this ground or because the administration was void, a depositor may recover a deposit paid to his duly appointed, so far as the record showed, personal representative.¹⁹ Under a statute a depositor may indicate in a book kept at the bank a person to whom his deposit is payable upon his death,²⁰ and the ap-

¹⁴ *Davies v. Mann*, 10 M. & W. 545, was the original case; but the great case of *Radley v. London Ry. Co.*, 1 App. Cas. 754, which passed on appeal through the Exchequer Chamber to the House of Lords, is the best illustration. The American cases may be found cited 2 *Thomp. Neg.* 1157, but the author's text shows that he does not understand the point.

¹⁵ The courts have failed to apply this principle, although it is hinted at in *People's Sav. Bank v. Cupps*, 91 Pa. 315; but in *Bank v. Morgan*, 117 U. S. 96, the court meant to state the principle, but instead said that the antecedent negligence of the bank would be a complete defense to the subsequent negli-

gence of the depositor. But negligence to be contributory must concur with negligence of another. If what the court says is true, it is perfectly safe to negligently kill any one who has through negligence put himself in a dangerous position. The court did not mean to state the proposition which it did.

¹⁶ See *Eagle Mfg. Co. v. Belcher*, 89 Ga. 218.

¹⁷ *Wall v. Emigrant Sav. Bank*, 64 Hun, 249.

¹⁸ *Farmer v. Manhattan Sav. Inst.*, 60 Hun, 462, *semble*.

¹⁹ *Jochumsen v. Suffolk Sav. Bank*, 85 Mass. 87.

²⁰ *Appeal of Knorr*, 89 Pa. 93.

pointee takes the fund.²¹ A rule of savings banks requires indemnity to be given by the depositor where the book cannot be produced. This rule is binding upon the depositor²² as well as his personal representative.²³ But if the book is withheld by the depositor's family, the administrator may recover without giving indemnity;²⁴ nor is the fact that indemnity is required by the rule, any reason for the depositor suing without such a tender not being permitted his action.²⁵ So the real owner of the deposit made for him by another, who received the bank-book, may recover the deposit, although his signature is not with the bank, because the person making the deposit signed his name; he needs not give indemnity to the bank, though the bank's custom required a deposit for another to be so entered on the books. The demand was held good where it was accompanied by an affidavit as to the circumstances of the deposit.²⁶ Under no circumstances is the bank permitted to retain the deposit because the book cannot be produced.²⁷ Where a statute provided that a deposit to the credit of a minor may be paid to the person making the deposit, yet, where the father and the minor both made deposits in the name of the minor, the payments to the father were good only to the extent of his contribution to the deposit.²⁸ Payment by the bank to the real owner, however made, pays the deposit.²⁹ Where the bank paid part of a deposit upon a genuine order and part upon a forged order, and the depositor received a deposit to her

²¹ *Fidelity Ins. Co. v. Wright*, 16 Wkly. Notes Cas. 177.

²² *Heath v. Portsmouth Sav. Bank*, 46 N. H. 78. Even though the book be lost. *Wall v. Provident Inst.*, 85 Mass. 96; *Mitchell v. Home Sav. Bank*, 38 Hun, 255.

²³ *Wall v. Provident Inst.*, 85 Mass. 96, 88 Mass. 320.

²⁴ *Palmer v. Providence Sav. Inst.*, 14 R. I. 68. No claim was made by any third party to the deposit.

²⁵ *Wagner v. Howard Sav. Inst.*, 52 N. J. Law, 225.

²⁶ *Wallace v. Lowell Inst.*, 7 Gray, 134. The Massachusetts cases are hard to reconcile, as to when the bank can insist upon indemnity and when not.

²⁷ *Palmer v. Providence Inst.*, 14 R. I. 68.

²⁸ *Dickinson v. Leominster Sav. Bank*, 152 Mass. 49.

²⁹ *Tay v. Concord Sav. Bank*, 60 N. H. 277.

credit from the forger to the amount of three-fourths of the genuine order to repay the loan made by the genuine order, the payment to credit was held to be upon the loan and not to reimburse the bank upon the forgery.³⁰ Where notice is required for a payment of the deposit, the bank waives the notice where it refuses to pay because it has paid to another.³¹ But there is no presumption that notice is required — the fact must be proven.³² The real owner, who waives his claim to the deposit, cannot hold the bank.³³

§ 364. **Actions for deposits.**—The usual action for a deposit will be the common-law action of assumpsit or debt.¹ The book is, of course, evidence to show the deposit, and it may be offered solely for that purpose.² A suit is not prematurely brought where the banker reserves sixty days' notice of a drawing of the deposit, where he does not demand it.³ Where conflicting claims are made upon the bank it may have an interpleader upon payment into court.⁴ But the application must show a *prima facie* case of conflicting claims, and the facts stated must be sufficient to indicate adverse titles.⁵ Under the statute the facts showing the nature of the claim made must be stated.⁶ And it was held that the bank could not interplead a claimant with title su-

³⁰ Underhill v. Poughkeepsie Sav. Bank, 32 Hun, 432.

³¹ Abramowitz v. Citizens' Sav. Bank, 40 N. Y. Supp. 385.

³² Weld v. Eliot Sav. Bank, 158 Mass. 339.

³³ McDermott v. Miners' Sav. Bank, 100 Pa. 285.

¹ Makin v. Inst. for Sav., 19 Me. 128. The beneficiary of a trust must, of course, seek his remedy in equity, except where a right to sue at law in exceptional cases exists in jurisdictions which have been hampered by the want of an equitable system of remedies.

² Brown v. Abington Sav. Inst., 119 Mass. 69. The matter may be of advantage in not compelling the plaintiff to offer the rules in evidence in connection with the fact of deposit.

³ Arnold v. Seifert, 76 Ill. App. 666.

⁴ Faivre v. Union Sav. Inst., 13 N. Y. Supp. 423.

⁵ Mars v. Albany Sav. Bank, 69 Hun, 398; Mahro v. Greenwich Sav. Bank, 38 N. Y. Supp. 126.

⁶ Mahro v. Greenwich Sav. Bank, 38 N. Y. Supp. 126.

prior to the depositor, where the claimant does not proceed by law to enforce his rights.⁷ An interpleader in the nature of a summons was also refused as against the administrator of the assignor where the assignee was suing in his name, although the statute permitted any other person than plaintiff to be summoned.⁸ A substitution of parties was refused where the bank held under a personal contract as agent or bailee.⁹

§ 365. Forfeiture of charter and insolvency.—The grounds for forfeiture of a charter of a bank have been already indicated.¹ In the case of a savings bank a forfeiture for suspension, where no stockholder was complaining, was refused.² Where insolvency occurs, the stockholders or the creditors have the usual remedies in such cases.³ But in some forms of savings bank one depositor cannot sue to recover his deposit, where a loss occurs because the assets belong to all the depositors alike.⁴ But upon a petition for a receiver there must be a charge of breach of trust by the officers unless the proceeding is given by statute.⁵ Unless a statute forbids it, a savings bank may make an assignment for creditors.⁶ But upon winding up the court cannot make a reduction on deposits and provide for payment in instalments,⁷ but under a statute it may do so.⁸ Where a receiver

⁷ *German Sav. Bank v. Friend*, 20 N. Y. Supp. 434.

⁸ *Pierce v. Boston Sav. Bank*, 125 Mass. 593.

⁹ *Lund v. Seamen's Bank*, 20 How. Pr. 461. The real ground for this decision was that there was no sufficient showing as to the adverse claim.

¹ See § 319, *ante*.

² *State v. La. Sav. Co.*, 12 La. Ann. 568. Courts in Louisiana have been compelled in times past to extend much indulgence to its banks.

³ See *Herron v. Vance*, 17 Ind.

595; *Raye v. Savings Inst.*, 14 Rich. Eq. 54. And see §§ 61, 65, 67, 80, 83, 84, 85, 86 and 356, *ante*.

⁴ *Bunnell v. Collinsville Sav. Soc.*, 38 Conn. 203; *Lewis v. Lynn Inst.*, 148 Mass. 235.

⁵ *Gorman v. Guardian Sav. Bank*, 4 Mo. App. 180.

⁶ *In re Miners' Bank*, 13 Wkly. Notes Cas. 370.

⁷ *In re Newport Sav. Bank*, 68 Me. 396.

⁸ *People v. Ulster Co. Sav. Inst.*, 133 N. Y. 689, affirming 20 N. Y. Supp. 148.

or assignee is appointed he has power to sue in his own name,⁹ or in that of the bank upon its claims. He may buy in at execution sale made for the bank.¹⁰ He may sue to set aside a fraudulent assignment or transfer by the bank,¹¹ and he may enforce the bank's claims against its officers.¹² But under one statute it was held that he could not sue upon the stockholders' liability.¹³ Where the managers of a savings bank have gone into equity to protect the depositors, they must realize upon the assets and pay depositors as fast as possible without sacrifice.¹⁴ The expenses of winding up a savings bank of the old type must be paid first and then the debts, and last the depositors,¹⁵ but under another system the depositors were on the same plane with the general creditors.¹⁶ The claims against the bank take precedence in the order fixed by statute or the general law. Thus the capital cannot be claimed by the depositors alone,¹⁷ but a promise by the bank to use certain securities for the benefit of its savings depositors creates a lien upon a trust in those securities;¹⁸ yet where a savings bank with powers to execute trusts received a deposit upon trust to pay the income to the widow and the surplus of income to her children, it was held that, as there was nothing to show a special deposit or anything else than a general deposit, there was no priority.¹⁹ The decision can be justified only on the ground that the bank was a trustee for the depositors. If it was not, the decision is wrong.²⁰ A check given in payment of a deposit but itself not paid is not entitled to priority, but money paid to the bank to obtain its check to accommodate the payee

⁹ Hall v. Bracket, 60 N. H. 215.

¹⁰ Hobart v. Bennett, 77 Me. 401.

¹¹ Holden v. Phelps, 135 Mass. 61.

¹² Van Dyck v. McQuade, 57 How. Pr. 62; and see cases cited in notes 33 and 34 to § 356, *ante*.

¹³ Herron v. Vance, 17 Ind. 595. See § 66, *ante*.

¹⁴ In re Dane Savings Inst., 29 N. J. Eq. 109.

¹⁵ Cogswell v. Rockingham Sav. Bank, 59 N. H. 43; Stockton v. Sav. Bank, 32 N. J. Eq. 163.

¹⁶ People v. Mechanics' Sav. Inst., 92 N. Y. 7.

¹⁷ Appeal of Fox, 93 Pa. 406.

¹⁸ Ward v. Johnson, 95 Ill. 215.

¹⁹ Vail v. Newark Sav. Inst., 32 N. J. Eq. 627. See § 353, *ante*.

²⁰ See § 341, *ante*.

is a preferred claim, where the check was dishonored.²¹ The last case is called one of special deposit, but the facts do not bear out that construction. It was a mere general deposit, not entitled to a priority, unless the bank was known to be insolvent when it took the money. There are sometimes different classes of depositors, and if the deposits of one kind have a lien on the assets they are ahead of the ordinary depositors.²² Where one set of depositors were entitled to profits and the other set were mere general depositors, the bank was held to be a trustee for all alike.²³ A decision rendered against a class of depositors who were represented by a chairman of their committee was held binding upon all of the class in favor of the receiver.²⁴ The depositor's right of set-off depends upon whether he is in the position of a stockholder when he has no set-off,²⁵ or in the position of a creditor when he has.²⁶ But a special agreement made by the bank may give him the right,²⁷ even where he would not otherwise have it. But where the set-off exists, if there be a statute the case must fall within the statute. Makers of a joint and several note were held under a statute to have no set-off against the note for their individual deposits.²⁸ An assignee of a depositor can set off his deposit against the bank's claim without any previous notice of the assignment being given.²⁹ An agreement made by the bank to

²¹ *Stockton v. Mechanics' Sav. Bank*, 32 N. J. Eq. 163.

²² *Heironimus v. Sweeney*, 83 Md. 146.

²³ *Stockton v. Mechanics' Sav. Bank*, 32 N. J. Eq. 163.

²⁴ *Dewey v. St. Albans Trust Co.*, 60 Vt. 1.

²⁵ *Osborn v. Byrne*, 43 Conn. 155; *Cogswell v. Rockingham Sav. Bank*, 59 N. H. 43; *Stockton v. Mechanics' Sav. Bank*, 32 N. J. Eq. 163.

²⁶ The rule would be the rule as to commercial banks. See § 144, *ante*.

²⁷ *Hall v. Paris*, 59 N. H. 71, where the set-off was allowed because the deposit had been made to pay the particular debt. But the set-off was denied where the deposit represented the money borrowed. *Hannon v. Williams*, 34 N. J. Eq. 255. *Contra*, *New Amsterdam Sav. Bank v. Tartters*, 4 Abb. N. C. 215.

²⁸ *Barnstable Sav. Bank v. Snow*, 128 Mass. 512. The rule was statutory. But see §§ 140 and 144, *ante*.

²⁹ *Bridgewater Sav. Bank v. Soule*, 129 Mass. 528.

hold the deposit of one against the overdraft of another is not enforceable against the bank after insolvency.³⁰

³⁰ *Van Dyck v. McQuade*, 20 Hun, 262, 85 N. Y. 616. If the lien upon the other deposit was created by the agreement, then certainly it would follow that the bank itself could not refuse to enforce its lien. If it should enforce its lien it could do so only by applying the deposit, and if the deposit had remained a general deposit, the application would, no doubt, give that general depositor a preference. But the effect of the agreement was to make the deposit special, and to make it security for the overdraft. If that is so, the special deposit clearly had a priority and the ruling was wrong.

CHAPTER XV.

CLEARING-HOUSES.

§ 366. **Nature of the clearing-house.**—A clearing-house is a voluntary association¹ of banks for the purpose of facilitating exchanges and settlements between them. Each bank in the clearing-house has a representative there at a certain hour. He sits at a desk and receives all paper against his bank and delivers to the representative of each other bank the paper which his bank holds against that particular bank. If the bank delivers more paper than it receives it is entitled to a credit against the other bank; if it delivers less than it receives, it is debited in favor of the other bank. Settlements between banks are made either by clearing-house certificates or in cash. If made in clearing-house certificates the manager issues to the bank entitled to a credit a certificate for the amount and charges it against the bank from which the credit is owing in favor of the other bank. Each bank has until a certain hour to return any paper upon it as not good, but those settlements are outside of the clearing-house and between the banks; yet the settlement is governed by the rules of the clearing-house. Each bank in the clearing-house is required to deposit with the clearing-house either money or securities to secure the clearing-house certificates charged against it; or, if this be not done, certain restrictions are put upon the members as to the balances in cash which they must carry. In times of financial distress

¹ *Crane v. Fourth St. Bank*, 173 Pa. 566. But it is not a bank, says this case. Yet it may sue. *Philler v. Patterson*, 168 Pa. 468. It may be sued. *Yardley v. Philler*, 58 Fed. R. 746. It may issue certificates or due-bills which are negotiable like bank-notes (*Dutton v. Merchants' Nat. Bank*, 16 Phila. 94), yet they are not currency, says the opinion in *Crane v. Bank*, *supra*. It remains for the Pennsylvania courts to unravel this tangle.

banks have received assistance in further certificates from the clearing-house upon the deposit of securities with it. Those banks in a city which are not in the clearing-house, generally do their clearing through a member of the association.

§ 367. **Clearing-house certificates.**—The status of these documents has not been settled. They are issued by a voluntary association and pass between the banks as money. There is no reason why they should not pass among individuals as money, because they are supported by the joint credit of all the banks in the clearing-house. If the veracious daily press may be believed, on one occasion in New York city the banks would pay their depositors nothing but such certificates. They do not seem to differ in any respect, when so used, from the notes of a private banker, since the clearing-house is simply a voluntary association.¹ The only bearing this question has is: Would they be a violation of laws inhibiting a private banker from issuing notes, and therefore void because unlawful, and secondly, would they be taxable as the note issues of a private banker? The further question as to who would be responsible upon the certificates if a crash should come would need to be determined after wise cogitations by courts as to whether or not a bank, national or state, has the implied power to enter a partnership which issues its obligations, when the justification presented is that it is an incalculable facilitation to the transaction of a vast volume of business which could hardly be transacted in any other way. Some zealous official might find occupation for

¹ See *Crane v. Fourth St. Bank*, 173 Pa. 566. It is not a bank; but if it is a voluntary association that issues paper and performs many of the functions of a bank, what is it? The case says that it does not violate the currency laws of the United States. That is certainly true, because those laws only prevent pri-

vate issues by means of the state-bank tax. This case says the certificates are not currency, yet they are negotiable. *Dutton v. Merchants' Nat. Bank*, 16 Phila. 94. But the whole utterance in the case first above cited is a mass of illy considered *dictum*.

his leisure in attempting to collect the state-bank tax, but he would probably resign upon an urgent request.

§ 368. Rules of the clearing-house.—The rules of the clearing-house are binding only upon the members. They are not binding upon the depositors in the various banks;¹ nor can customers claim the benefit of them or be injuriously affected by them.² A rule does not apply in favor of a bank not a member of the clearing-house;³ nor can the rule be called a general custom when it is observed only by the banks in the clearing-house.⁴ It has been seen that the clearing-houses allow mutual credits to be recalled between the banks within a certain time; and on the theory that this rule is binding upon the members of the clearing-house, it has been held that mutual credits could be recalled only in accordance with this rule; in other words, that the payment by the bank of paper upon it, provisionally made, becomes absolute if not objected to within the time allowed by the rule.⁵ But the courts of Massachusetts deny this effect to the rule and say that the rule simply compels the clearing banks to allow the recall of the credit within that time, but otherwise the parties are left in the situation they are placed by the general rules of law. So it is held that as to a mistake by a messenger,⁶ or a mistake as to the depositor's account,⁷ or a mistake as to the signature of the depositor, or even where there was no mistake, the credit may be recalled, provided the other bank has not altered its position to its disadvantage.⁸ But as we have seen, a bank

¹ *Louisiana Ice Co. v. State Nat. Bank*, 1 McGloin, 181.

² *Merchants' Nat. Bank v. National Bank*, 139 Mass. 513.

³ *Oberman v. Hoboken City Bank*, 30 N. J. Law, 61.

⁴ *First Nat. Bank v. Fourth Nat. Bank*, 89 N. Y. 412.

⁵ *Blaffer v. Louisiana Nat. Bank*, 35 La. Ann. 251; *Preston v. Canadian Bank*, 23 Fed. R. 179.

⁶ *Merchants' Nat. Bank v. National Eagle Bank*, 101 Mass. 281; *National Bank of North America v. Bangs*, 106 Mass. 441.

⁷ *National Ex. Bank v. National Bank of North America*, 132 Mass. 147; *Manufacturers' Nat. Bank v. Thompson*, 129 Mass. 438.

⁸ *Merchants' Nat. Bank v. National Bank*, 139 Mass. 513.

can always recover upon paper paid by it forged as to the amount or as to an indorsement,⁹ and the clearing-house rule could have no effect as to such paper; and as to paper where the drawer's name is forged, the bank paying may sometimes recover where the other party has not altered his position to his injury.¹⁰ But a payment made upon a mistake as to the drawer's account is final and cannot be rescinded¹¹ except under and in accordance with this clearing-house rule. The doctrine of the Massachusetts court is singular in this respect, unless it can be said that the recovery is based upon the other bank's indorsement.¹² A rule of the clearing-house may be waived by refunding.¹³

§ 369. Bank as clearing agent.—The rule of the clearing-house as to a clearing agent generally requires notice to be given before the agent can withdraw, and therefore the clearing agent must keep on receiving and paying the paper on the bank for which it acts until the expiration of that period, although the bank for which it is acting has become insolvent. The agent could hold the securities deposited with it by the bank whose paper it paid.¹ This decision, in effect, permits a clearing-house rule to annul the statute against preferences, because it allows claims against the bank to be paid after insolvency, and the bank's assets to be impressed with a lien therefor, excused by the court on the ground that the lien already existed. The decision is a complete and signal judicial error, for the lien existed only as to payments up to that time made, and it cannot be reconciled with the spirit of the opinion in *Yardley v. Philler*, 167 U. S. 344. In another case it was said that a clearing agent's agreement to pay checks on another bank did not impose upon it the same liabilities that were imposed upon

⁹ See § 154, *ante*.

¹⁰ See § 154, *ante*.

¹¹ See § 158, *ante*.

¹² See § 155, *ante*.

¹³ *Stuyvesant Bank v. National Mechanics' Bank*, 7 Lans. 197.

¹ *O'Brien v. Grant*, 146 N. Y. 163. Compare *Nat. Security Bank v. Butler*, 129 U. S. 223.

the bank on which the paper was drawn.² But the latter bank would be bound by the act of its clearing agent in waiving the rule of the clearing-house as to a revocation of credit.³ The agent is not negligent for failure to anticipate that a bank suspended on one day would resume business on the next day.⁴

§ 370. Clearing-house settlements.—It has been said that a settlement through the clearing-house upon balances presented does not become an account stated, where made in time of great public excitement, when there was no chance to investigate.¹ The settlements made through the clearing-house do not inure to the benefit of customers of the various banks. Thus, a man deposited a draft with a bank and the draft was paid to the first bank by a second bank, leaving upon the settlement for the day both banks indebted to the clearing-house. The second bank paid its balance to the clearing-house, but the first bank failed before doing so, and it failed having the proceeds of the depositor's collection. Thereupon the clearing-house collected from the different banks the total amount of credits which had been permitted to such banks on items which they had presented against the first bank which had failed. Thus, it will be

² *Grant v. McNutt*, 33 N. Y. Supp. 62. It was held in *Zenner v. Nat. Bank of Illinois*, 54 Ill. App. 602, that the clearing agent, which had paid a check drawn upon its principal, could sue the drawer where the drawee, its principal, failed without paying the check. The opinion is not at all satisfactory.

³ *Stuyvesant Bank v. Nat. Mechanics' Bank*, 7 Lans. 197.

⁴ *Farmers' Bank v. Third Nat. Bank*, 165 Pa. 500.

¹ *Nat. City Bank v. N. Y. Gold Exchange Bank*, 101 N. Y. 595. The stamp of the clearing-house is

a good transfer by receipt of payment. *Zenner v. National Bank*, 54 Ill. App. 602. A bank having paid a check through the clearing-house for another bank, the latter bank having failed without paying the check drawn on it, the bank paying was held entitled to recover from drawer. Why? The obvious conclusion would be that the clearing agent paid the check for its principal, not as agent of the drawer. By some wild theory it might sue the payee, but where it obtained its right to sue the drawer is a mystery.

seen the clearing-house certainly obtained through the payment by the second bank of the balance due from it and from the payment by all the banks of the credits allowed to them, the money from the depositor's collection. Yet it was held that the depositor of the draft could not recover from the clearing-house the amount of his draft.² The reason of the decision can only be that the first bank had obtained the proceeds and it was immaterial how the various banks settled among themselves. The second bank was the one injured by the transaction. In yet another case a draft on one bank was indorsed for collection to a second bank, which sent it to the clearing-house in due course with other checks and drafts. The second bank failed before the collection was complete, but the clearing-house collected the draft from the first bank, the drawee. Thereupon the depositor for collection sued the drawer upon the draft and collected it, the payment to the clearing-house being no defense.³ If there is any reason for making such a decision it is not apparent from the opinion. The clearing-house demanded and obtained payment as agent for the insolvent bank. The holder of the collection had the right to reclaim the proceeds from the clearing-house, because the power of the second bank to collect was revoked by the insolvency; but the insolvency did not revoke the power of the clearing-house to proceed with the collection, and the payment by the drawee to the clearing-house was a good payment to the owner. The opinion fails to explain how the holder could sue the bank on which the check was drawn.

² Crane v. Clearing-house, 2 Pa. Dist. R. 509.

³ Crane v. Fourth St. Bank, 173 Pa. 566. It would naturally occur to any one to inquire what the clearing-house did with the money. Could the Fourth Street Bank sue for a payment voluntarily made? Even if it could, the policy of the

decision seems exceedingly questionable. It is entirely illogical, because the holder could not sue the bank on which the check was drawn except on the theory that the payment to the clearing-house was an acceptance; but the clearing-house was a stranger, says the court.

§ 371. Clearing-house lien.—Since insolvency of a national bank does not interfere with or change any liens existing at the time of the insolvency, the clearing-house has a perfect right to enforce upon the securities deposited with it any lien which is existing at the date of the insolvency, but not a lien for any claims against an insolvent national bank accruing after insolvency. It is for this reason that the decision referred to in the last section but one in the case of *O'Brien v. Grant*, 146 N. Y. 163, is so radically unsound. The reason that such a lien will not be permitted is that it creates an unlawful preference. This is the result arrived at in the litigation that culminated in the decision of the Supreme Court of the United States in *Yardley v. Philler*, 167 U. S. 344. The deposit of securities in that case was twofold — a deposit to secure clearing-house certificates, and the retention of the paper of the insolvent bank upon each day until it settled its balance with the clearing-house for that day. The clearing-house was allowed its lien for the daily balances up to notice of the insolvency upon the proceeds of the collections in its hands, but it was not allowed a lien upon these proceeds for its certificates of deposit issued on the security of other deposits of paper, nor for a balance accruing from the transactions had after notice of the insolvency.¹ Another case arising upon the insolvency of a clearing-house member showed the following state of facts: Securities were deposited with the clearing-house to secure the members' daily balances and then any other indebtedness due to members of the association. The clearing-house was given a lien for its certificates issued to aid in maintaining the credit of the bank.² Another case presented facts similar to *Yardley v. Philler*, *supra*, and the clearing-house was held to be a holder for value of such de-

¹ See § 327, *ante*, note 8.

² *Philler v. Jewett*, 166 Pa. 456. Indebtedness to members of the association was treated as indebted-

ness to the clearing-house. But it would appear that the clearing-house had notice of insolvency.

posits of paper to the amount of its lien.³ In a former section (327) it was pointed out that these decisions are questionable because the clearing-house must have had notice that the bank was so near insolvency that it could not maintain its daily business without help. If it could be shown that the bank was actually insolvent, there might be a serious question whether the clearing-house was justified in lending it funds so that it could continue longer to deceive and defraud the public.

³Philler v. Patterson, 168 Pa. 468. house of its certificates is not a
This case informs the profession violation of the national banking
that the issuance by a clearing- act. They are therefore valid.



APPENDIX.

REVISED STATUTES OF THE UNITED STATES AND ACTS AMENDATORY THEREOF.

SEC. 324. BUREAU OF THE COMPTROLLER OF THE CURRENCY.—There shall be in the Department of the Treasury a bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of a national currency secured by United States bonds; the chief officer of which shall be called the Comptroller of the Currency, and shall perform his duties under the general direction of the Secretary of the Treasury.

[Act of March 14, 1900, creates separate divisions of issue and redemption.]

SEC. 325. COMPTROLLER OF THE CURRENCY.—The Comptroller of the Currency shall be appointed by the President, on the recommendation of the Secretary of the Treasury, by and with the advice and with the consent of the Senate, and shall hold his office for the term of five years unless sooner removed by the President, on reasons to be communicated by him to the Senate; and he shall be entitled to a salary of \$5,000 a year.

SEC. 326. BOND AND OATH.—The Comptroller of the Currency shall within fifteen days from the time of notice of his appointment, take and subscribe the oath of office; and he shall give to the United States a bond in the penalty of \$100,000 with not less than two responsible sureties, to be approved by the Secretary of the Treasury, conditioned for the faithful discharge of the duties of his office.

SEC. 327. DEPUTY COMPTROLLER.—There shall be in the Bureau of the Comptroller of the Currency a Deputy Comptroller of the Currency to be appointed by the Secretary, who shall be entitled to a salary of \$2,500 a year, and who shall possess the power and perform the duties attached by law to the office of the Comptroller during a vacancy in the office or during the absence or inability of the Comptroller. The Deputy Comptroller shall also take the oath of office prescribed by the constitution and laws of the United States, and shall give a like bond in the penalty of \$50,000.

SEC. 328. CLERKS.—The Comptroller of the Currency shall employ, from time to time, the necessary clerks, to be appointed and classified by the Secretary of the Treasury, to discharge such duties as the Comptroller shall direct.

SEC. 329. INTEREST IN NATIONAL BANKS.—It shall not be lawful for the Comptroller or the Deputy Comptroller of the Currency, either directly or indirectly, to be interested in any association issuing national currency under the laws of the United States.

SEC. 330. SEAL.—The seal devised by the Comptroller of the Currency for his office and approved by the Secretary of the Treasury shall continue to be the seal of office of the Comptroller, and may be renewed when necessary. A description of the seal with an impression thereof and a certificate of approval by the Secretary of the Treasury shall be filed in the office of the Secretary of State.

SEC. 331. ROOMS, VAULTS, FURNITURE, ETC.—There shall be assigned from time to time to the Comptroller of the Currency by the Secretary of the Treasury, suitable rooms in the Treasury Building for conducting the business of the Currency Bureau, containing safe and secure fire-proof vaults, in which the Comptroller shall deposit and safely keep all the plates not necessarily in the possession of engravers or printers, and other valuable things belonging to his department, and the Comptroller shall from time to time furnish the necessary furniture, stationery, fuel, lights and other proper conveniences for the transaction of the business of his office.

SEC. 332. BANKS IN DISTRICT OF COLUMBIA.—The Comptroller of the Currency in addition to the powers conferred upon him by law for the examination of national banks is further authorized, whenever he may deem it useful, to cause examination to be made into the condition of any bank in the District of Columbia organized under Act of Congress. The Comptroller, at his discretion, may report to Congress the results of such examination. The expense necessarily incurred in such examination shall be paid out of any appropriation made by Congress for special bank examiners.

SEC. 333. REPORT OF THE COMPTROLLER.—(This section is not deemed necessary to be inserted.)

SEC. 563. JURISDICTION OF THE DISTRICT COURTS.—Clause 15th. *The District Court shall have jurisdiction as follows:*

15th. Of all suits by or against any association established under a law providing for national banking associations within the district for which the court is held.

SEC. 629. JURISDICTION OF THE CIRCUIT COURTS.—Clause 10th. *The Circuit Court shall have original jurisdiction as follows:*

10th. Of all suits by or against any banking association established in the district for which the court is held under a law providing for national banking associations.

11th. Of all suits brought by (or against) any banking association established in the district for which the court is held under the provisions of title "The National Banks" to enjoin the Comptroller of the Currency, or any Receiver acting under his direction, as provided by said title.

Section 4, Act of July 12, 1882, 22 Stat. 162.— *Proviso:* Provided, however, that the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking association may be doing business when such suits may be begun; and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby repealed.

Section 4, Act of March 3, 1887, 24 Stat. 54, 25 Stat. 434.— That all banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.

SEC. 736. PROCEEDINGS TO ENJOIN COMPTROLLER.— All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located.

SEC. 885. COPIES AS EVIDENCE.— Copies of the organization certificate of any national banking association, duly certified by the Comptroller of the Currency, and authenticated by his seal of office, shall be evidence in all courts and places within the jurisdiction of the United States of the existence of the association, and of every matter which could be proved by the production of the original certificate.

SEC. 3417. PROVISIONS FOR BANK TAX AND RETURNS NOT TO APPLY TO NATIONAL BANKS.— (The section is not deemed necessary to be inserted.)

SEC. 5133. FORMATION OF NATIONAL BANKING ASSOCIATIONS.— Associations for carrying on the business of banking under this title may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office.

SEC. 5134. REQUISITES OF ORGANIZATION CERTIFICATE.— The persons

uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state:

First. The name assumed by such association; which name shall be subject to the approval of the Comptroller of the Currency.

Second. The place where its operations of discount and deposit are to be carried on, designating the State, Territory, or district, and the particular county and city, town, or village.

Third. The amount of capital stock and the number of shares into which the same is to be divided.

Fourth. The names and places of residence of the shareholders and the number of shares held by each of them.

Fifth. The fact that the certificate is made to enable such persons to avail themselves of the advantages of this title.

Act of May 1, 1886, 24 Stat. 18, provides, section two: That any national banking association may change its name or the place where its operations of discount and deposit are to be carried on, to any other place within the same State, not more than thirty miles distant, with the approval of the Comptroller of the Currency, by the vote of shareholders owning two-thirds of the stock of such association, and duly authenticated notice of the vote, and the new name or location selected shall be sent to the office of the Comptroller of the Currency; but no change of name or location shall be valid until the Comptroller shall have issued his certificate of approval of the same.

§ 3. That all debts, liabilities, rights, provisions and powers of the association under its old name shall devolve upon and inure to the association under its new name.

§ 4. That nothing in this act contained shall be so construed as in any manner to release any national banking association under its old name or at its old location from any liability, or affect any action or proceeding at law in which said association may be or become a party or interested.

SEC. 5135. ACKNOWLEDGMENT AND FILING.—The organization certificate shall be acknowledged before a judge of some court of record, or notary public; and shall be, together with the acknowledgment thereof, authenticated by the seal of such court, or notary, transmitted to the Comptroller of the Currency, who shall record and carefully preserve the same in his office.

SEC. 5136. CORPORATE POWERS.—Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power —

First. To adopt and use a corporate seal.

Second. To have succession for the period of twenty years from its organization, unless it is sooner dissolved according to the provisions of

its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth. To prescribe by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title. But no association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking.

Act of July 12, 1882, 22 Stat. 162, provides: That any national banking association may, at any time within the two years next previous to the date of the expiration of its corporate existence under present law, and with the approval of the Comptroller of the Currency, to be granted as hereinafter provided, extend its period of succession by amending its articles of association for a term of not more than twenty years from the expiration of the period of succession named in said articles of association, and shall have succession for such extended period, unless sooner dissolved by the act of shareholders owning two-thirds of its capital stock, or unless its franchise becomes forfeited by some violation of law, or unless hereafter modified and repealed.

§ 2. That such amendment of said articles of association shall be authorized by the consent in writing of the shareholders owning not less than two-thirds of the capital stock of the association; and the board of directors shall cause such consent to be certified under the seal of the association, by its president, or cashier, to the Comptroller of the Currency, accompanied by an application made by the president or cashier for the approval of the amended articles of association by the Comptroller; and such amended articles of association shall not be valid until

the Comptroller shall give to such association a certificate under his hand and seal that the association has complied with all the provisions required to be complied with, and is authorized to have succession for the extended period named in the amended articles of association.

§ 3. That upon the receipt of the application of a certificate of the association, provided for in the preceding section, the Comptroller of the Currency shall cause a special examination to be made, at the expense of the association, to determine its condition; and if after such examination or otherwise it appears to him that said association is in a satisfactory condition, he shall grant his certificate of approval provided for in the preceding section, or if it appears that the condition of said association is not satisfactory, he shall withhold such certificate of approval.

§ 4. That any association so extending the period of its succession, shall continue to enjoy all the rights and privileges and immunities granted, and shall continue to be subject to all the duties, liabilities and restrictions imposed by the Revised Statutes of the United States and other acts having reference to national banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of succession: *Provided*, however, that the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking associations may be doing business when such suits may be begun; and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby repealed.

§ 5. That when any national banking association has amended its articles of association as provided in this act, and the Comptroller has granted his certificate of approval, any shareholder not assenting to such amendment, may give notice in writing to the directors within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by such shareholder, one by the directors, and the third by the first two; and in case the value so fixed shall not be satisfactory to any such shareholder, he may appeal to the Comptroller of the Currency, who shall cause a re-appraisal to be made, which shall be final and binding; and if said re-appraisal shall exceed the value fixed by said committee, the bank shall pay said expenses, and the value so ascertained and determined shall be deemed to be a debt due, and be forthwith paid to said shareholder from said bank; and the shares so surrendered and appraised shall, after due notice, be sold at public sale, within thirty days after the final appraisal provided in this section:

Provided, that in the organization of any banking association intended to replace any existing banking association, and retaining the name thereof, the holders of stock in the expiring association shall be entitled to preference in the allotment of the shares in the new association in proportion to the number of shares held by them respectively in the expiring association.

§ 6 provides for the redemption of the circulating notes of the bank securing an extension.

§ 7. That national banking associations whose corporate existence has expired or shall hereafter expire, and which do not avail themselves of the provisions of this act, shall be required to comply with the provisions of Revised Statutes, §§ 5221 and 5222, in the same manner as if the shareholders had voted to go into liquidation, as provided in the Revised Statutes, § 5220; and the provisions of the Revised Statutes, §§ 5224 and 5225, shall also be applicable to such associations, except as modified by this act; and the franchise of such association is hereby extended for the sole purpose of liquidating their affairs until such affairs are finally closed.

§ 8. That national banks now organized or hereafter organized, having a capital of one hundred and fifty thousand dollars or less, shall not be required to keep on deposit or deposited with the Treasurer of the United States, bonds in excess of one quarter of their capital stock as security for their circulating notes; but such banks shall keep on deposit or deposited with the Treasurer of the United States the amount of bonds as herein required. And such of those banks having on deposit bonds in excess of that amount, are authorized to reduce their circulation by the deposit of lawful money as provided by law: *Provided* that the amount of such circulation shall not in any case exceed ninety per centum of the par value of the bonds deposited as herein provided: *Provided further*, that the national banks which shall hereafter make deposits of lawful money for the retirement in full of circulating notes shall at the time of their deposit be assessed for the cost of transporting and redeeming their notes then outstanding, a sum equal to the average cost of redemption of national bank notes during the preceding year, and shall thereupon pay such assessment. And all national banks which have heretofore made or shall hereafter make deposits of lawful money for the redemption of their circulation shall be assessed and pay such assessment in the manner specified in section three of the act approved June 20, 1874, for the cost of transporting and redeeming their notes redeemed from such deposits subsequently to June 30, 1881.

§ 9. That any national banking association now organized or hereafter organized, desiring to withdraw its circulating notes, upon a deposit of lawful money with the Treasurer of the United States, as provided in section four of the act of June 20, 1874, or as provided in this act, is authorized to deposit lawful money and withdraw a proportionate amount of the bonds held as security for the circulating notes

in the order of such deposits; and no national bank which makes any deposit of lawful money in order to withdraw its circulating notes, shall be entitled to receive any increase of its circulation for the period of six months from the time it made such deposit of lawful money for the purpose aforesaid: *Provided*, that not more than three millions of dollars of lawful money shall be deposited during any calendar month for this purpose; and provided further, that the provisions of this section shall not apply to bonds called for redemption by the Secretary of the Treasury, nor to the withdrawal of circulating notes in consequence thereof.

§ 10. That upon a deposit of bonds as described by §§ 5159, 5160, except as modified by section four, of the act of June 20, 1874, and as modified by section eight of this act, the association making the same shall be entitled to receive from the Comptroller of the Currency circulating notes of different denominations, in blank, registered and countersigned as provided by law, equal in amount to ninety per centum of the current market value, not exceeding par, of the United States bonds so transferred and delivered, and at no time shall the total amount of such notes issued to any such association exceed ninety per centum of the amounts at such time paid in of its capital stock; and the provisions of Revised Statutes, §§ 5171 and 5176, are hereby repealed.

[Act of March 14, 1900, allows national banking associations to issue circulating notes up to the par value of the bonds deposited and up to the full amount of the capital stock.]

§ 11 provides for the exchange of three and one-half per centum bonds for registered bonds of the United States.

§ 12 provides for the reception by the Secretary of the Treasury of gold coin and the issuance of certificates therefor in denominations of not less than twenty dollars and provides for the retaining of the coin deposits in the Treasury. Said certificates shall be receivable for customs, taxes, and all public dues, and when so received may be re-issued; and such certificates and also silver certificates when held by any national banking association, shall be counted as part of its lawful reserve; and no national banking association shall be a member of any clearing-house in which such certificates shall not be receivable in the settlement of clearing-house balances: *Provided*, that the Secretary of the Treasury shall suspend the issue of such gold certificates whenever the amount of gold coin and gold bullion in the treasury reserve for the redemption of United States notes falls below one hundred million dollars; and the provisions of Revised Statutes, § 5207, shall be applicable to the certificates herein authorized and directed to be issued.

[Act of March 14, 1900, makes the gold reserve in the Treasury one hundred and fifty million dollars.]

§ 13. That any officer, clerk or agent of any national banking association who shall wilfully violate the provisions of § 5208, Revised Statutes, or who shall resort to any device, or receive a fictitious obligation, directly

or as collateral, in order to avoid the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be guilty of a misdemeanor, and shall on conviction thereof in any circuit or district court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court.

SEC. 5137. POWER TO HOLD REAL PROPERTY.—A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others: -

First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years.

SEC. 5138. REQUISITE AMOUNT OF CAPITAL.—No association shall be organized under this title with a less capital than one hundred thousand dollars; except that banks with a capital of not less than fifty thousand dollars may, with the approval of the Secretary of the Treasury, be organized in any place the population of which does not exceed six thousand inhabitants. No association shall be organized in a city the population of which exceeds fifty thousand persons with a less capital than two hundred thousand dollars.

[Act of March 14, 1900, allows formation of national banking associations with capital of \$25,000 in cities with less than 3,000 inhabitants.]

SEC. 5139. SHARES OF STOCK AND TRANSFERS.—The capital stock of such association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association, by which the rights, remedies, or security of the existing creditors of the association shall be impaired.

SEC. 5140. PAYMENT OF CAPITAL STOCK.—At least fifty per centum of the capital stock of every association shall be paid in before it shall be authorized to commence business; and the remainder of the capital stock of such association shall be paid in instalments of at least ten per centum each, on the whole amount of the capital, as frequently as one

instalment at the end of each succeeding month from the time it shall be authorized by the Comptroller of the Currency to commence business; and the payment of each instalment shall be certified to the Comptroller, under oath, by the president or cashier of the association.

SEC. 5141. FAILURE TO PAY INSTALMENTS.—Whenever any shareholder, or his assignee, fails to pay any instalment on the stock when the same is required by the preceding section to be paid, the directors of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks' previous notice thereof in a newspaper published and of general circulation in the city or county where the association is located, or if no newspaper is published in said city or county, then in a newspaper published nearest thereto, to any person who will pay the highest price therefor, to be not less than the amount then due thereon, with the expenses of advertisement and sale; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the directors may order, within six months from the time of such forfeiture, and if not sold it shall be canceled and deducted from the capital stock of the association. If any such cancellation and reduction shall reduce the capital of the association below the minimum of capital required by law, the capital stock shall, within thirty days from the date of such cancellation, be increased to the required amount; in default of which a receiver may be appointed, according to the provisions of section fifty-two hundred and thirty-four, to close up the business of the association.

SEC. 5142. INCREASE OF STOCK.—Any association formed under this title may, by its articles of association, provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this title. But the maximum of such increase to be provided in the articles of association shall be determined by the Comptroller of the Currency; and no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association.

Act May 1, 1886, 24 Stat. 18.—That any national banking association may, with the approval of the Comptroller of the Currency, by the vote of shareholders owning two-thirds of the stock of such association, increase its capital stock, in accordance with the existing laws, to any sum approved by the said Comptroller, notwithstanding the limit fixed in its original articles of association as determined by said Comptroller; and no increase of the capital stock of any national banking

association, either within or beyond the limit fixed in its original articles of association, shall be made except in the manner herein provided.

SEC. 5143. REDUCTION OF CAPITAL STOCK.—Any association formed under this title may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and his approval thereof obtained.

SEC. 5144. RIGHT OF SHAREHOLDERS TO VOTE.—In all elections of directors, and in deciding all questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him. Shareholders may vote by proxies duly authorized in writing; but no officer, clerk, teller, or bookkeeper of such association shall act as proxy; and no shareholder whose liability is past due and unpaid shall be allowed to vote.

SEC. 5145. ELECTION OF DIRECTORS.—The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders at a meeting to be held at any time before the association is authorized by the Comptroller of the Currency to commence the business of banking; and afterward at meetings to be held on such day in January of each year as is specified therefor in the articles of association. The directors shall hold office for one year, and until their successors are elected and have qualified.

SEC. 5146. REQUISITE QUALIFICATIONS OF DIRECTORS.—Every director must, during his whole term of service, be a citizen of the United States, and at least three-fourths of the directors must have resided in the State, Territory, or district in which the association is located, for at least one year immediately preceding their election, and must be residents therein during their continuance in office. Every director must own, in his own right, at least ten shares of the capital stock of the association of which he is a director. Any director who ceases to be the owner of ten shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place.

SEC. 5147. OATH OF DIRECTORS AND FILING THEREOF.—Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this title, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by his title, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. Such oath, subscribed by the director making it, and certified by the officer before whom it is taken, shall be immediately transmitted to the Comptroller of the Currency, and shall be filed and preserved in his office.

SEC. 5148. FILLING VACANCIES.— Any vacancy in the board shall be filled by appointment by the remaining directors, and any director so appointed shall hold his place until the next election.

SEC. 5149. PROCEEDINGS WHERE NO ELECTION.— If, from any cause, an election of directors is not made at the time appointed, the association shall not for that cause be dissolved, but an election may be held on any subsequent day, thirty days' notice thereof in all cases having been given in a newspaper published in the city, town, or county in which the association is located; and if no newspaper is published in such city, town, or county, such notice shall be published in a newspaper published nearest thereto. If the articles of association do not fix the day on which the election shall be held, or if no election is held on the day fixed, the day for the election shall be designated by the board of directors in their by-laws, or otherwise; or if the directors fail to fix the date, shareholders representing two-thirds of the shares may do so.

SEC. 5150. PRESIDENT.— One of the directors, to be chosen by the board, shall be the president of the board.

SEC. 5151. INDIVIDUAL LIABILITY OF SHAREHOLDERS.— The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association now existing under State laws, having not less than five millions of dollars of capital actually paid in, and a surplus of twenty per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in such shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this title; and if at any time there is a deficiency in such surplus of twenty per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of Chapter four of this title.

SEC. 5152. EXECUTORS, TRUSTEES, &C.— Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name.

SEC. 5153. PUBLIC DEPOSITARIES.— All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall per-

form all such reasonable duties, as depositaries of public moneys and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government. And every association so designated as receiver or depositary of the public money, shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government, for internal revenue, or for loans or stocks.

SEC. 5154. CHANGE OF STATE BANKS TO NATIONAL BANKS.— Any bank incorporated by special law, or any banking institution organized under a general law of any State, may become a national association under this title by the name prescribed in its organization certificate; and in such case the articles of association and the organization certificate may be executed by a majority of the directors of the bank or banking institution; and the certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate, and to change and convert the bank or banking institution into a national association. A majority of the directors, after executing the articles of association and organization certificate, shall have power to execute all other papers, and to do whatever may be required to make its organization perfect and complete as a national association. The shares of any such bank may continue to be for the same amount each as they were before the conversion, and the directors may continue to be the directors of the association until others are elected or appointed in accordance with the provisions of this chapter; and any State bank which is a stockholder in any other bank, by authority of State laws, may continue to hold its stock, although either bank, or both, may be organized under and have accepted the provisions of this title. When the Comptroller of the Currency has given to such association a certificate, under his hand and official seal, that the provisions of this title have been complied with, and that it is authorized to commence the business of banking, the association shall have the same powers and privileges, and shall be subject to the same duties, responsibilities, and rules, in all respects, as are prescribed for other associations originally organized as national banking associations, and shall be held and regarded as such an association. But no such association shall have a less capital than the amount prescribed for associations organized under this title.

Act of February 14, 1880, 21 Stat. 66, provides: That any national gold bank organized under the provisions of the laws of the United States, may, in the manner and subject to the provisions prescribed by Revised Statutes, § 5154, for the conversion of banks incorporated under the laws of any State, cease to be a gold bank, and become such an

association as is authorized by § 5133, for carrying on the business of banking, and shall have the same powers and privileges, and shall be subject to the same duties, responsibilities, and rules, in all respects, as are by law prescribed for such associations: *Provided*, that all certificates of organization which shall be included under this act, shall bear the date of the original organization of each bank respectively as a gold bank.

SEC. 5155. STATE BANKS WITH BRANCHES.—It shall be lawful for any bank or banking association organized under State laws, and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain; the amount of the circulation redeemable at the mother bank, and each branch, to be regulated by the amount of capital assigned to and used by each.

SEC. 5156. Reserves the rights of associations organized under the Act of 1863.

SEC. 5158. REGISTERED BONDS.—The term "United States bonds," as used throughout this chapter, shall be construed to mean registered bonds of the United States.

SEC. 5159. DEPOSITED BONDS.—Every association, after having complied with the provisions of this title, preliminary to the commencement of the banking business, and before it shall be authorized to commence banking business under this title, shall transfer and deliver to the Treasurer of the United States any United States registered bonds, bearing interest, to an amount not less than thirty thousand dollars and not less than one-third of the capital stock paid in. Such bonds shall be received by the Treasurer upon deposit, and shall be by him safely kept in his office, until they shall be otherwise disposed of, in pursuance of the provisions of this title.

SEC. 5160. INCREASE OR REDUCTION OF DEPOSIT.—The deposit of bonds made by each association shall be increased as its capital may be paid up or increased, so that every association shall at all times have on deposit with the Treasurer registered United States bonds to the amount of at least one-third of its capital stock actually paid in. And any association that may desire to reduce its capital or to close up its business and dissolve its organization, may take up its bonds upon returning to the Comptroller its circulating notes in the proportion hereinafter required, or may take up any excess of bonds beyond one-third of its capital stock, and upon which no circulating notes have been delivered.

SEC. 5161. EXCHANGE OF COUPON FOR REGISTERED BONDS.—To facilitate a compliance with the two preceding sections, the Secretary of the Treasury is authorized to receive from any association, and cancel, any United States coupon bonds, and to issue in lieu thereof registered bonds of like amounts, bearing a like rate of interest, and having the same time to run.

SEC. 5162. MANNER OF MAKING TRANSFERS OF BONDS.—All transfers in United States bonds, made by any association under the provisions of this title, shall be made to the Treasurer of the United States in trust for the association, with a memorandum written or printed on each bond, and signed by the cashier, or some other officer of the association making the deposit. A receipt shall be given to the association, by the Comptroller of the Currency, or by a clerk appointed by him for that purpose, stating that the bond is held in trust for the association on whose behalf the transfer is made, and as security for the redemption and payment of any circulating notes that have been or may be delivered to such association. No assignment or transfer of any such bond by the Treasurer shall be deemed valid unless countersigned by the Comptroller of the Currency.

SEC. 5163. REGISTRY OF TRANSFERS.—The Comptroller of the Currency shall keep in his office a book in which he shall cause to be entered, immediately upon countersigning it, every transfer or assignment by the Treasurer, of any bonds belonging to a national banking association, presented for his signature. He shall state in such entry the name of the association from whose accounts the transfer is made, the name of the party to whom it is made, and the par value of the bonds transferred.

SEC. 5164. NOTICE OF TRANSFER.—The Comptroller of the Currency shall, upon countersigning and entering any transfer or assignment by the Treasurer, of any bonds belonging to a national banking association, advise by mail the association from whose accounts the transfer is made, of the kind and numerical designation of the bonds, and the amount thereof so transferred.

SEC. 5165. EXAMINATION OF REGISTRY.—The Comptroller of the Currency shall have at all times, during office hours, access to the books of the Treasurer of the United States for the purpose of ascertaining the correctness of any transfer or assignment of the bonds deposited by an association, presented to the Comptroller to countersign; and the Treasurer shall have the like access to the book mentioned in section fifty-one hundred and sixty-three, during office hours, to ascertain the correctness of the entries in the same; and the Comptroller shall also at all times have access to the bonds on deposit with the Treasurer, to ascertain their amount and condition.

SEC. 5166. ANNUAL EXAMINATION OF BONDS.—Every association having bonds deposited in the office of the Treasurer of the United States shall, once or oftener in each fiscal year, examine and compare the bonds pledged by the association with the books of the Comptroller of the Currency and with the accounts of the association, and, if they are found correct, shall execute to the Treasurer, a certificate setting forth the different kinds and the amounts thereof, and that the same are in the possession and custody of the Treasurer at the date of the certificate. Such examination shall be made at such time or times, during the ordinary

business hours, as the Treasurer and Comptroller, respectively, may select, and may be made by the officer or agent of such association, duly appointed in writing for that purpose; and his certificate before-mentioned shall be of like force and validity as if executed by the president or cashier. A duplicate of such certificate signed by the Treasurer, shall be retained by the association.

SEC. 5167. CUSTODY OF BONDS AND COLLECTION OF INTEREST.—The bonds transferred to and deposited with the Treasurer of the United States, by any association, for the security of its circulating notes, shall be held exclusively for that purpose, until such notes are redeemed, as provided in this title. The Comptroller of the Currency shall give to any such association powers of attorney to receive and appropriate to its own use the interest on the bonds which it has so transferred to the Treasurer; but such powers shall become inoperative whenever such association fails to redeem its circulating notes. Whenever the market or cash value of any bonds thus deposited with the Treasurer is reduced below the amount of the circulation issued for the same, the Comptroller may demand and receive the amount of such depreciation in other United States bonds at cash value, or in money, from the association, to be deposited with the Treasurer as long as such association continues. And the Comptroller, upon the terms prescribed by the Secretary of the Treasury, may permit an exchange to be made of any of the bonds deposited with the Treasurer by any association for other bonds of the United States authorized to be received as security for circulating notes, if he is of opinion that such an exchange can be made without prejudice to the United States; and he may direct the return of any bonds to the association which transferred the same, in sums of not less than one thousand dollars upon the surrender to him and the cancellation of a proportionate amount of such circulating notes: *Provided*, that the remaining bonds which shall have been transferred by the association offering to surrender circulating notes, are equal to the amount required for the circulating notes not surrendered by such association, and that the amount of bonds in the hands of the Treasurer is not diminished below the amount required to be kept on deposit with him, and that there has been no failure by the association to redeem its circulating notes, nor any other violation by it of the provisions of this title, and that the market or cash value of the remaining bonds is not below the amount required for the circulation issued for the same.

SEC. 5168. COMPTROLLER'S EXAMINATION.—Whenever a certificate is transmitted to the Comptroller of the Currency as provided in this title, and the association transmitting the same notifies the Comptroller that at least fifty per centum of its capital stock has been duly paid in, and that such association has complied with all the provisions of this title required to be complied with before an association shall be authorized to commence the business of banking, the Comptroller shall examine into the condition of such association, ascertain especially the amount

of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this title required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oath of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the Comptroller to determine whether the association is lawfully entitled to commence the business of banking.

SEC. 5169. CERTIFICATE OF AUTHORITY.—If, upon a careful examination of the facts so reported and of any other facts which may come to the knowledge of the Comptroller, whether by means of a special commission appointed by him for the purpose of inquiry into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the Comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the Comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this title.

SEC. 5170. PUBLICATION OF CERTIFICATE.—The association shall cause the certificate issued under the preceding section to be published in some newspaper printed in the city or county where the association is located, for at least sixty days next after the issuing thereof; or, if no newspaper is published in such city or county, then in the newspaper published nearest thereto.

SEC. 5171. Repealed. See section 10, Act of July 12, 1882.

SEC. 5172. Prescribes directions for the printing, denominations and form of the circulating notes.

SEC. 5173. Provides for the custody of the plates and special dies for the printing of notes.

SEC. 5174. Provides for an annual examination of the plates and dies.

SEC. 5175. DENOMINATIONS OF NOTES.—Not more than one-sixth part of the notes furnished to any association shall be of a less denomination than five dollars. After specie payments are resumed, no association shall be furnished with notes of a less denomination than five dollars.

SEC. 5176. Repealed.

SEC. 5177. Repealed.

SEC. 5178. Apportions aggregate amount of circulating notes among the various States and Territories.

SEC. 5179. Provides for equalizing the distribution.

SEC. 5180. Provides for the withdrawal of notes of associations in pursuance of such equalization.

SEC. 5181. Provides for the removal of any association located in a State having more than its proportion of circulation to a State having less than its proportion.

Act of January 19, 1875, 18 Stat. 296, provides: That each existing banking association may increase its circulating notes in accordance with existing law without respect to said aggregate limit; and new banking associations may be organized in accordance with existing law without respect to said aggregate limit; and the provisions of law for the withdrawal and redistribution of national bank currency among the several States and Territories are hereby repealed.

SEC. 5182. NATIONAL BANK NOTES AND MONEY.—After any association receiving circulating notes under this title has caused its promise to pay such notes on demand to be signed by the president or vice-president and cashier thereof, in such manner as to make them obligatory promissory notes, payable on demand, at its place of business, such association may issue and circulate the same as money. And the same shall be received at par in all parts of the United States in payment of taxes, excises, public lands, and all other dues to the United States, except duties on imports; and also for all salaries and other debts and demands owing by the United States to individuals, corporations and associations within the United States, except interest on the public debt, and in redemption of the national currency.

Act of July 28, 1892, 27 Stat. 322, provides that the provisions of the Revised Statutes of the United States providing for the redemption of national bank notes, shall apply to all national bank notes that have been or may be issued to, or received by, any national bank, notwithstanding such notes may have been lost by or stolen from a bank and put in circulation without the signature or upon the forged signature of the president or vice-president and cashier.

SEC. 5183. PROHIBITION OF OTHER NOTES.—No national banking association shall issue post notes or any other notes to circulate as money than such as are authorized by the provisions of this title.

SEC. 5184. WORN-OUT AND MUTILATED NOTES.—It shall be the duty of the Comptroller of the Currency to receive worn-out or mutilated circulating notes issued by any banking association, and also, on due proof of the destruction of any such circulating notes, to deliver in place thereof to the association other blank circulating notes to an equal amount. Such worn-out or mutilated notes, after a memorandum has been entered in the proper books, in accordance with such regulations as may be established by the Comptroller, as well as all circulating notes which shall have been paid or surrendered to be canceled, shall be burned to ashes in presence of four persons, one to be appointed by the Secretary of the Treasury, one by the Comptroller of the Currency, one by the Treasurer of the United States, and one by the association, under such regulations as the Secretary of the Treasury may prescribe. A certificate of such burning, signed by the parties so appointed, shall be made in

the books of the Comptroller, and a duplicate thereof forwarded to the association whose notes are thus canceled.

SEC. 5185. ORGANIZATION OF ASSOCIATIONS TO ISSUE GOLD NOTES.—Associations may be organized in the manner prescribed by this title for the purpose of issuing notes payable in gold; and upon the deposit of any United States bonds bearing interest payable in gold with the Treasurer of the United States, in the manner prescribed for other associations, it shall be lawful for the Comptroller of the Currency to issue to the association making the deposit circulating notes of different denominations, but none of them of less than five dollars and not exceeding in amount eighty per centum of the par value of the bonds deposited, which shall express the promise of the association to pay them, upon presentation at the office at which they are issued, in gold coin of the United States, and shall be so redeemable. But no such association shall have a circulation of more than one million of dollars.

Act of January 19, 1875, 18 Stat. 302, provides that each of such existing banking associations may increase its circulating notes, and new banking associations may be organized, in accordance with existing law, without respect to such limitation.

SEC. 5186. LAWFUL MONEY RESERVES.—Every association organized under the preceding section shall at all times keep on hand not less than twenty-five per centum of its outstanding circulation, in gold or silver coin of the United States; and shall receive at par in the payment of debts the gold notes of every other such association which at the time of such payment is redeeming its circulating notes in gold coin of the United States, and shall be subject to all the provisions of this title: *Provided*, that, in applying the same to associations organized for issuing gold notes, the terms "lawful money" and "lawful money of the United States" shall be construed to mean gold or silver coin of the United States; and the circulation of such associations shall not be within the limitation of circulation mentioned in the title.

SEC. 5187. PENALTY FOR ISSUING CIRCULATING NOTES TO UNAUTHORIZED ASSOCIATIONS.—No officer acting under the provisions of this title shall countersign or deliver to any association, or to any other Company or person, any circulating notes contemplated by this title, except in accordance with the true intent and meaning of its provisions. Every officer who violates this section shall be deemed guilty of a high misdemeanor, and shall be fined not more than double the amount so countersigned and delivered, and imprisoned not less than one year and not more than fifteen years.

SEC. 5188. IMITATION OF NOTES FOR ADVERTISING.—It shall not be lawful to design, print, or in any manner make or execute, or to utter, issue, distribute, circulate, or use, any business or professional card, notice, placard, circular, hand-bill, or advertisement, in the likeness or similitude, of any circulating note or other obligation or security of any banking association organized or acting under the laws of the United

States which has been or may be issued under this title, or any act of Congress, or to write, print, or otherwise impress upon any such note, obligation, or security any business or professional card, notice or advertisement, or any notice or advertisement of any matter or thing whatever. Every person who violates this section shall be liable to a penalty of one hundred dollars, recoverable one half to the use of the informer.

SEC. 5189. MUTILATION OF BANK NOTES.—Every person who mutilates, cuts, defaces, disfigures, or perforates with holes, or unites or cements together, or does any other thing to any bank bill, draft, note, or other evidence of debt, issued by any national banking association, or who causes or procures the same to be done, with intent to render such bank bill, draft, note or other evidence of debt unfit to be re-issued by said association, shall be liable to a penalty of fifty dollars, recoverable by the association.

SEC. 5190. PLACE OF BUSINESS.—The usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate.

SEC. 5191. LAWFUL MONEY RESERVE.—Every national banking association in either of the following cities: Albany, Baltimore, Boston, Cincinnati, Chicago, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Pittsburgh, Saint Louis, San Francisco, and Washington, shall at all times have on hand, in lawful money of the United States, an equal amount to at least twenty-five per centum of the aggregate amount of its notes in circulation and its deposits; and every other association shall at all times have on hand, in lawful money of the United States, an equal amount to at least fifteen per centum of the aggregate amounts of its notes in circulation, and of its deposits. Whenever the lawful money of any association in any of the cities named shall be below the amount of twenty-five per centum of its circulation and deposits, and whenever the lawful money of any other association shall be below fifteen per centum of its circulation and deposits, such association shall not increase its liabilities by making any new loans or discounts otherwise than by discounting or purchasing bills of exchange, payable at sight, nor make any dividend of its profits until the required proportion, between the aggregate amount of its outstanding notes of circulation and deposits and its lawful money of the United States, has been restored. And the Comptroller of the Currency may notify any association, whose lawful money reserve shall be below the amount above required to be kept on hand, to make good such reserve; and if such association shall fail for thirty days thereafter so as to make good its reserve of lawful money, the Comptroller may, with the concurrence of the Secretary of the Treasury, appoint a receiver to wind up the business of the association, as provided in section fifty-two hundred and thirty-four.

Stat. of March 3, 1887, 25 Stat. 559, provides that whenever three-fourths in number of the national banks located in any city in

the United States having a population of fifty thousand people shall make application to the Comptroller of the Currency, in writing, asking that the name of the city in which such banks are located shall be added to the cities named in the Revised Statutes, sections fifty-one hundred and ninety-one and fifty-one hundred and ninety-two, the Comptroller shall have authority to grant such request, and every bank located in such city shall at all times thereafter have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of its deposits, as provided in Revised Statutes, sections fifty-one hundred and ninety-one and fifty-one hundred and ninety-five.

§ 2. That whenever three-fourths in number of the national banks located in any city of the United States having a population of two hundred thousand people shall make application to the Comptroller of the Currency, in writing, asking that such city may be a central reserve city, like the City of New York, in which one-half of the lawful money reserve of the national banks located in other reserve cities, may be deposited, as provided in Revised Statutes, section fifty-one hundred and ninety-five, the Comptroller shall have authority, with the approval of the Secretary of the Treasury, to grant such request, and every bank located in such city shall at all times thereafter have on hand, in lawful money of the United States, twenty-five per centum of its deposits, as provided in the Revised Statutes, section fifty-one hundred and ninety-one.

SEC. 5192. WHAT MAY BE COUNTED TOWARD LAWFUL MONEY RESERVE.—Three-fifths of the reserve of fifteen per centum required by the preceding section to be kept, may consist of balances due to an association, available for the redemption of its circulating notes, from associations approved by the Comptroller of the Currency, organized under the act of June three, eighteen hundred and sixty-four, or under this title, and doing business in the cities of Albany, Baltimore, Boston, Charleston, Chicago, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Pittsburgh, Richmond, Saint Louis, San Francisco, and Washington. Clearing-house certificates, representing specie or lawful money specially deposited for the purpose, of any clearing-house association, shall also be deemed to be lawful money in the possession of any association belonging to such clearing-house, holding and owning such certificate, within the preceding section.

Act of June 20, 1874, 18 Stat. 123, provides, section two, that section thirty-one of the National Bank Act (section fifty-one hundred and ninety-one, fifty-one hundred and ninety-two, Revised Statutes) be so amended that the central associations therein provided for shall not hereafter be required to keep on hand any amount of money whatever, by reason of the amount of their respective circulations; but the moneys required by said section to be kept at all times on hand shall be determined by the amount of deposits in all respects, as provided for in said section.

§ 3. That every association organized, or to be organized under the provisions of said act, and of the several acts amendatory thereof, shall at all times keep and have on deposit in the Treasury of the United States in lawful money of the United States, a sum equal to five per centum of its circulation, to be held and used for the redemption of such circulation; which sum shall be counted as a part of its general reserve, as provided in section two of this act; and when the circulating notes of any such associations, assorted or unassorted shall be presented for redemption, in sums of one thousand dollars, or any multiple thereof, to the Treasurer of the United States, the same shall be redeemed in United States notes. All notes so redeemed shall be charged by the Treasurer of the United States to the respective associations issuing the same, and he shall notify them separately on the first day of each month, or oftener, at his discretion, of the amount of such redemptions; and whenever such redemptions for any association shall amount to the sum of five hundred dollars, such association so notified shall forthwith deposit with the Treasurer of the United States a sum in United States notes equal to the amount of its circulating notes so redeemed. And all notes of national banks, worn, defaced, mutilated, or otherwise unfit for circulation shall, when received by any assistant treasurer, or at any designated depository of the United States, be forwarded to the Treasurer of the United States for redemption as provided herein. And when such redemptions have been so reimbursed, the circulating notes so redeemed shall be forwarded to the respective associations by which they were issued; but if any such notes are worn, mutilated, defaced, or rendered otherwise unfit for use, they shall be forwarded to the Comptroller of the Currency and destroyed and replaced as now provided by law: *Provided*, that each of said associations shall reimburse to the treasury the charges for transportation and the cost for assorting such notes; and the associations hereafter organized shall also severally reimburse to the treasury the cost of engraving such plates as shall be ordered by each association respectively; and the amount assessed by each association shall be in proportion to the circulation redeemed, and be charged to the fund on deposit with the Treasurer; and provided further, that so much of section thirty-two of said National Bank Act requiring or permitting the redemption of its circulating notes elsewhere than at its own counter, except as provided for in this section, is hereby repealed.

(Act of March 3, 1875, 18 Stat. 399, provides for the reimbursement of the Treasurer by the Secretary of the Treasury of the expenses incurred under this act.)

§ 4. That any association organized under this act or any of the acts of which this is an amendment, desiring to withdraw its circulating notes, in whole or in part, may, upon the deposit of lawful money with the Treasurer of the United States in sums of not less than nine thousand dollars, take up the bonds which said association has on deposit

with the Treasurer for the security of such circulating notes; which bonds shall be assigned to the bank in the manner specified in section nineteen of the National Bank Act; and the outstanding notes of the association to an amount equal to the legal tender notes deposited, shall be redeemed at the Treasury of the United States, and destroyed as now provided by law: *Provided*, that the amount of the bonds on deposit for circulation shall not be reduced below fifty thousand dollars.

§ 5. Requires the Comptroller of the Currency to cause the charter numbers of the association to be printed upon all national bank notes hereafter issued.

§ 6. That the amount of United States notes outstanding and to be used as a part of the circulating medium, shall not exceed the sum of three hundred and eighty-two millions of dollars, which said sum shall appear in each monthly statement of the public debt, and no part thereof shall be held or used as the reserve.

SEC. 5193. CERTIFICATES OF DEPOSIT.—The Secretary of the Treasury may receive United States notes on deposit, without interest, from any national banking associations, in sums of not less than ten thousand dollars, and issue certificates therefor in such form as he may prescribe, in denominations of not less than five thousand dollars, and payable on demand in United States notes at the place where the deposits were made. The notes so deposited shall not be counted as part of the lawful money reserve of the association; but the certificates issued therefor may be counted as part of its lawful money reserve, and may be accepted in the settlement of clearing-house balances at the places where the deposits therefor were made.

SEC. 5194. LIMITATION ON CERTIFICATES.—The power conferred on the Secretary of the Treasury, by the preceding section, shall not be exercised so as to create any expansion or contraction of the currency. And United States notes for which certificates are issued under that section, or other United States notes of like amount, shall be held as special deposits in the Treasury, and used only for the redemption of such certificates.

SEC. 5195. PLACE OF REDEMPTION.—Each association organized in any of the cities named in section fifty-one hundred and ninety-one shall select, subject to the approval of the Comptroller of the Currency, an association in the city of New York, at which it will redeem its circulating notes at par; and may keep one-half of its lawful money reserve in cash deposits in the city of New York. But the foregoing provision shall not apply to associations organized and located in the city of San Francisco for the purpose of issuing notes payable in gold. Each association not organized within the cities named, shall select, subject to the approval of the Comptroller, an association in either of the cities named, at which it will redeem its circulating notes at par. The Comptroller shall give public notice of the names of the associations selected, at which redemptions are to be made by the respective associations, and

of any change that may be made of the association at which the notes of any association are redeemed. Whenever any association fails either to make the selection or to redeem its notes as aforesaid, the Comptroller of the Currency may, upon receiving satisfactory evidence thereof, appoint a receiver in the manner provided for in section fifty-two hundred and thirty-four, to wind up its affairs. But this section shall not relieve any association from its liability to redeem its circulating notes at its own counter, at par, in lawful money on demand.

(See section three of act of June 20, 1874, *ante*.)

SEC. 5196. NATIONAL BANK NOTES.—Every national banking association formed or existing under this title, shall take and receive at par, for any debt or liability to it, any and all notes or bills, issued by any lawfully organized national banking association. But this provision shall not apply to any association organized for the purpose of issuing notes payable in gold.

SEC. 5197. RATE OF INTEREST.—Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the State, Territory, or district where the bank is located, and no more, except that where by the laws of any State, a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State, under this Title. Where no rate is fixed by the laws of the State, or Territory, or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

SEC. 5198. EFFECT OF USURIOUS INTEREST.—The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred.

Act of February 18, 1875, 18 Stat. 320, provides that suits, actions, and proceedings against any association under this title may be had in any Circuit, District, or territorial court of the United States held within the district in which such association may be established,

or in any state, county, or municipal court in the County or City in which said association is located having jurisdiction in similar cases.

SEC. 5199. DIVIDENDS.—The directors of any association may, semi-annually, declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one-tenth part of its net profits of the preceding half year to its surplus fund until the same shall amount to twenty per centum of its Capital stock.

SEC. 5200. LIMITATION OF LIABILITY OF ANY BORROWER.—The total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed including, in the liabilities of a company or firm, the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the Capital stock of such association actually paid in. But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same, shall not be considered as money borrowed.

SEC. 5201. PURCHASE OF ITS OWN STOCK.—No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or in default thereof, a receiver may be appointed to close up the business of the association, according to section fifty-two hundred and thirty-four.

SEC. 5202. LIMIT UPON INDEBTEDNESS.—No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserved profits.

SEC. 5203. RESTRICTION UPON USE OF CIRCULATING NOTES.—No association shall, either directly or indirectly, pledge or hypothecate any of its notes or circulation, for the purpose of procuring money to be paid in on its capital stock or to be used in its banking operations or otherwise; nor shall any association use its circulating notes, or any part thereof, in any manner or form, to create or increase its capital stock.

SEC. 5204. PROHIBITION FROM WITHDRAWAL OF CAPITAL.—No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in

the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association, equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. All debts due to any association, on which interest is past due and unpaid for a period of six months, unless the same are well secured, and in process of collection, shall be considered bad debts within the meaning of this section. But nothing in this section shall prevent the reduction of the capital stock of the association under section fifty-one hundred and forty-three.

SEC. 5205. PAYMENT OF DEFICIENCY.—Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency of the capital stock, by assessment upon the shareholders *pro rata* for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four. [And provided, that if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto), to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders.]

SEC. 5206. RESTRICTION UPON USE OF NOTES OF OTHER BANKS.—No association shall at any time pay out on loans or discounts, or in purchasing drafts or bills of exchange, or in payment of deposits, or in any other mode pay or put in circulation, the notes* of any bank or banking association which are not, at any such time, receivable, at par, on deposit, and in payment of debts by the association so paying out or circulating such notes; nor shall any association knowingly pay out or put in circulation any notes issued by any bank or banking association which at the time of such paying out or putting in circulation, is not redeeming its circulating notes, in lawful money of the United States.

SEC. 5207. UNITED STATES NOTES OR BANK NOTES AS COLLATERAL.—No association shall hereafter offer or receive United States notes or national bank notes as security or as collateral security for any loan of money, or for a consideration agree to withhold the same from use, or offer or receive the custody or promise of custody of such notes as security, or as collateral security, or consideration for any loan of money. Any association offending against the provisions of this section shall be deemed guilty of a misdemeanor, and shall be fined not more than one thousand dollars and a further sum equal to one-third of the money so loaned. The officer or officers of any association who shall make any such loan shall be liable for a further sum equal to one-quarter of the money loaned; and any fine or penalty incurred by a violation of this section shall be recoverable for the benefit of the party bringing such suit.

SEC. 5208. FALSELY CERTIFYING CHECKS.—It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association; but the act of any officer, clerk, or agent of any association, in violation of this section, shall subject such bank to the liabilities and proceedings on the part of the Comptroller as provided for in section fifty-two hundred and thirty-four.

SEC. 5209. EMBEZZLEMENT.—Every President, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

SEC. 5210. LIST OF SHAREHOLDERS.—The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the in-

spection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under State authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such President or cashier, shall be transmitted to the Comptroller of the Currency.

SEC. 5211. REPORTS TO COMPTROLLER.—Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified; and shall be transmitted to the Comptroller within five days after a request or requisition therefor from him, and in the same form in which it is made to the Comptroller shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in one published nearest thereto in the same county at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition.

Act of February 26, 1881, 21 Stat. 352, provides that the oath or affirmation required by section fifty-two hundred and eleven of the Revised Statutes, verifying the returns made by national banks to the Comptroller of the Currency, when taken before a notary public properly authorized and commissioned by the State in which such notary resides and the bank is located, or any other officer having an official seal, authorized in such State to administer oaths, shall be sufficient verification as contemplated by said section fifty-two hundred and eleven: *Provided*, that the officer administering the oath is not an officer of the bank.

SEC. 5212. REPORT AS TO DIVIDENDS.—In addition to the reports required by the preceding section, each association shall report to the Comptroller of the Currency, within ten days after declaring any dividend, the amount of such dividend, and the amount of net earnings in excess of such dividend. Such reports shall be attested by the oath of the president or cashier of the association.

SEC. 5213. PENALTY FOR FAILURE TO MAKE REPORT.—Every association which fails to make and transmit any report required under either of the two preceding sections shall be subject to a penalty of one hundred dollars for each day after the periods, respectively, therein mentioned, that it delays to make and transmit its report. Whenever any association delays or refuses to pay the penalty herein imposed, after

it has been assessed by the Comptroller of the Currency, the amount thereof may be retained by the Treasurer of the United States, upon the order of the Comptroller of the Currency, out of the interest, as it may become due to the association, on the bonds deposited with him to secure circulation. All sums of money collected for penalties under this section shall be paid into the Treasury of the United States,

SEC. 5214. TAXES PAYABLE TO THE UNITED STATES.—In lieu of all existing taxes, every association shall pay to the Treasurer of the United States, in the months of January and July, a duty of one-half of one per centum each half year upon the average amount of its notes in circulation, and a duty of one quarter of one per centum each half year on the average amount of its capital stock, beyond the amount invested in United States bonds.

SEC. 5215. RETURN OF CIRCULATION, DEPOSITS AND CAPITAL STOCK.—In order to enable the Treasurer to assess the duties imposed by the preceding section, each association shall, with ten days from the first days of January and July of each year, make a return, under the oath of its president or cashier, to the Treasurer of the United States, in such form as the Treasurer may prescribe, of the average amount of its notes in circulation, and of the average amount of its deposits, and of the average amount of its capital stock, beyond the amount invested in United States bonds, for the six months next preceding the most recent first day of January or July. Every association which fails so to make such return shall be liable to a penalty of two hundred dollars, to be collected either out of the interest as it may become due such association on the bonds deposited with the Treasurer, or, at his option, in the manner in which penalties are to be collected of other corporations under the laws of the United States.

SEC. 5216. PENALTY FOR FAILURE TO MAKE RETURN.—Whenever an association fails to make the half yearly return required by the preceding section, the duties to be paid by such association shall be assessed upon the amount of notes delivered to such association by the Comptroller of the Currency, and upon the highest amount of its deposits and capital stock, to be ascertained in such manner as the Treasurer may deem best.

SEC. 5217. PENALTY FOR FAILURE TO PAY DUTIES.—Whenever an association fails to pay the duties imposed by the three preceding sections, the sums due may be collected in the manner provided for the collection of United States taxes from other corporations; or the Treasurer may reserve the amount out of the interest, as it may become due, on the bonds deposited with him by such defaulting association.

SEC. 5218. REFUNDING EXCESSIVE DUTIES.—In all cases where an association has paid or may pay in excess of what may be or has been found due from it, on account of the duty required to be paid to the Treasurer of the United States, the association may state an account therefor, which, on being certified by the Treasurer of the United States, and

found correct by the first Comptroller of the Treasury, shall be refunded in the ordinary manner by warrant on the Treasury.

SEC. 5219. TAXATION BY STATE.— Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed.

SEC. 5220. VOLUNTARY DISSOLUTION.— Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock.

SEC. 5221. NOTICE OF INTENT TO DISSOLVE.— Whenever a vote is taken to go into liquidation it shall be the duty of the board of directors to cause notice of this fact to be certified, under the seal of the association, by its president or cashier, to the Comptroller of the Currency, and publication thereof to be made for a period of two months in a newspaper published in the city of New York, and also in a newspaper published in the city or town in which the association is located, or if no newspaper is there published, then in the newspaper published nearest thereto, that the association is closing up its affairs, and notifying the holders of its notes and other creditors to present the notes and other claims against the association for payment.

SEC. 5222. DEPOSIT OF LAWFUL MONEY TO REDEEM NOTES.— Within six months from the date of the vote to go into liquidation, the association shall deposit with the Treasurer of the United States, lawful money of the United States sufficient to redeem all its outstanding circulation. The Treasurer shall execute duplicate receipts for money thus deposited, and deliver one to the association and the other to the Comptroller of the Currency, stating the amount received by him, and the purpose for which it has been received; and the money shall be paid into the Treasury of the United States, and placed to the credit of such association upon redemption account.

SEC. 5223. ASSOCIATIONS CONSOLIDATING.— An association which is in good faith winding up its business for the purpose of consolidating with another association shall not be required to deposit lawful money for its outstanding circulation; but its assets and liabilities shall be reported by the association with which it is in process of consolidation.

SEC. 5224. RE-ASSIGNMENT OF BONDS.—Whenever a sufficient deposit of lawful money to redeem the outstanding circulation of an association proposing to close its business has been made, the bonds deposited by the association to secure the payment of its notes shall be re-assigned to it, in the manner prescribed by section fifty-one hundred and sixty-two. And thereafter the association and its shareholders shall stand discharged from all liabilities upon the circulating notes, and those notes shall be redeemed at the Treasury of the United States. [And if any such bank shall fail to make the deposit and take up its bonds for thirty days after the expiration of the time specified, the Comptroller of the Currency shall have power to sell the bonds pledged for the circulation of said bank, at public auction in New York City, and, after providing for the redemption and cancellation of said circulation and the necessary expenses of the sale, to pay over any balance remaining to the bank or its legal representative.]

SEC. 5225. DESTRUCTION OF REDEEMED NOTES.—Whenever the Treasurer has redeemed any of the notes of an association which has commenced to close its affairs under the (six) (five) preceding sections, he shall cause the notes to be mutilated and charged to the redemption account of the association; and all notes so redeemed by the Treasurer shall, every three months, be certified to and burned in the manner prescribed in section fifty-one hundred and eighty-four.

SEC. 5226. MODE OF PROTESTING NOTES.—Whenever any national banking association fails to redeem in the lawful money of the United States any of its circulating notes, upon demand of payment duly made during the usual hours of business, at the office of such association, or at its designated place of redemption, the holder may cause the same to be protested, in one package, by a Notary Public, unless the President or Cashier of the association whose notes are presented for payment, or the President or Cashier of the association at the place at which they are redeemable offers to waive demand and notice of the protest, and, in pursuance of such offer, makes, signs, and delivers to the party making such demand an admission in writing, stating the time of the demand, the amount demanded, and the fact of the non-payment thereof. The Notary Public, on making such protest, or upon receiving such admission, shall forthwith forward such admission or notice of protest to the Comptroller of the Currency, retaining a copy thereof. If, however, satisfactory proof is produced to the Notary Public that the payment of the notes demanded is restrained by an order of any court of competent jurisdiction, he shall not protest the same. When the holder of any notes causes more than one note or package to be protested on the same day, he shall not receive pay for more than one protest.

SEC. 5227. EXAMINATION BY SPECIAL AGENT.—On receiving notice that any banking association has failed to redeem any of its circulating notes, as specified in the preceding section, the Comptroller of the Currency, with the concurrence of the Secretary of the Treasury, may ap-

point a special agent, of whose appointment immediate notice shall be given to such association, who shall immediately proceed to ascertain whether it has refused to pay its circulating notes in the lawful money of the United States, when demanded, and shall report to the Comptroller the fact so ascertained. If, from such protest, and the report so made, the Comptroller is satisfied, that such association has refused to pay its circulating notes and is in default, he shall, within thirty days after he has received notice of such failure, declare the bonds deposited by such association forfeited to the United States, and they shall thereupon be so forfeited.

SEC. 5228. BUSINESS AFTER DEFAULT.—After a default on the part of an association to pay any of its circulating notes has been ascertained by the Comptroller, and notice (of forfeiture of bonds) (thereof) has been given by him to the association, it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it, and to deliver special deposits.

SEC. 5229. NOTICE TO NOTE HOLDERS.—Immediately upon declaring the bonds of an association forfeited for non-payment of its notes, the Comptroller shall give notice, in such manner as the Secretary of the Treasury shall, by general rules or otherwise, direct, to the holders of the circulating notes of such association, to present them for payment at the Treasury of the United States; and the same shall be paid as presented in lawful money of the United States; whereupon the Comptroller may in his discretion, cancel an amount of bonds pledged for such association equal at current market rates, not exceeding par, to the notes paid.

SEC. 5230. SALE OF BONDS AT AUCTION.—Whenever the Comptroller has become satisfied, by the protest or the waiver and admission specified in section fifty-two hundred and twenty-six, or by the report provided for in section fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes, he may, instead of canceling its bonds, cause so much of them as may be necessary to redeem its outstanding notes to be sold at public auction in the city of New York, after giving thirty days' notice of such sale to the association. For any deficiency in the proceeds of all the bonds of an association, when thus sold, to reimburse, to the United States, the amount expended in paying the circulating notes of the association, the United States shall have a paramount lien upon all its assets; and such deficiency shall be made good out of such assets in preference to any and all other claims whatsoever, except the necessary costs and expenses of administering the same.

SEC. 5231. SALE OF BONDS AT PRIVATE SALE.—The Comptroller may, if he deems it for the interest of the United States, sell at private sale any of the bonds of an association shown to have made default in paying its notes, and receive therefor either money or the circulating notes

of the association. But no such bonds shall be sold by private sale for less than par, nor for less than the market value thereof at the time of sale; and no sales of any such bonds, either public or private, shall be complete until the transfer of the bonds shall have been made with the formalities prescribed by section fifty-one hundred and sixty-two, fifty-one hundred and sixty-three, and fifty-one hundred and sixty-four.

SEC. 5232. DISPOSAL OF PROTESTED NOTES.—The Secretary of the Treasury may, from time to time, make such regulations respecting the disposition to be made of circulating notes after presentation at the Treasury of the United States for payment, and respecting the perpetuation of the evidence of the payment thereof, as may seem to him proper.

SEC. 5233. CANCELLATION OF BANK NOTES.—All notes of national banking associations presented at the Treasury of the United States for payment shall, on being paid, be canceled.

SEC. 5234. APPOINTMENT OF RECEIVERS.—On becoming satisfied, as specified in section fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct, and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings.

Act of June 30, 1876, 19 Stat. 63, provides that whenever any national banking association shall be dissolved, and its rights, privileges and franchises declared forfeited, as prescribed in Revised Statutes, section fifty-two hundred and thirty-nine, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of the national banking association, he may, after due examination of its franchise, in either case, appoint a receiver, who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty-four of said statutes.

§ 2. That when any national banking association shall have gone into liquidation under the provisions of section fifty-two hundred and twenty

of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes, may be enforced by any creditor of such association, by a bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.

§ 3. That whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of said statutes, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditors shall have been approved or allowed as therein prescribed, the full amount of such claims and all expenses of such receivership and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the stockholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote; and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and when any of the shareholders of the association shall have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of any and every claim that may thereafter be approved and allowed against such association by and before a competent court, and for the faithful performance and discharge of all and singular the duties of such agent, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets and property of such association then remaining in the hands or subject to the order or control of said Comptroller and said receiver, or either of them; and for this purpose said Comptroller and said receiver are hereby severally empowered to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; whereupon the said Comptroller and the said receiver shall, by virtue of this act, be discharged and released from any and all liabilities of such association, as to each and all the creditors and shareholders thereof; and such agent is hereby authorized to sell, compromise or compound the debts due to such association upon the order of a competent court of record or of the United States Circuit Court for the district where the business of the

association was carried on. Such agent shall hold, control, and dispose of the assets and property of any association which he may receive as hereinbefore provided for the benefit of the shareholders of such association as they, or the majority of them in value or number of shares, may direct, distributing such assets and property among such shareholders in proportion to the shares by each held; and he may, in his own name or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands. In selecting an agent as hereinbefore provided, administrators or executors of deceased stockholders may act the same as the decedent might have done if living, and guardians may so act and sign for their ward or wards.

§ 4. This will be found incorporated in section fifty-two hundred and five, *ante*.

§ 5. That all United States officers charged with the receipt or the disbursement of public moneys, and all officers of national banks, shall stamp or write in plain letters the words "counterfeit," "altered," or "worthless" upon all fraudulent notes issued in the form of, and intended to circulate as money, which shall be presented at their places of business; and if such officers shall wrongfully stamp a genuine note of the United States or of the national banks, they shall upon presentation, redeem such notes at the face value thereof.

§ 6. That all savings banks or savings and trust companies organized under authority of any act of Congress, shall be, and are hereby, required to make, to the Comptroller of the Currency, and publish, all the reports which national banking associations are required to make and to publish under the provisions of section fifty-two hundred and eleven, fifty-two hundred and twelve and fifty-two hundred and thirteen, and shall be subject to the same penalties for failure to make or publish such reports as are herein provided; which penalties may be collected by suit before any court of the United States in the district in which said savings banks or savings and trust companies may be located. And all savings or other banks now organized, or which shall hereafter be organized, in the District of Columbia, under any act of Congress, which shall have capital stock paid up in whole or in part, shall be subject to all the provisions of the Revised Statutes, and of all acts of Congress applicable to national banking associations, so far as the same may be applicable to such savings or other banks: *Provided*, that such savings banks now established shall not be required to have a paid in capital exceeding one hundred thousand dollars.

Section three of the preceding act was amended by act of August 3, 1892, to read as follows:

§ 3. That whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and fifty-four and other sections of the Revised Statutes of the United States, and when, as provided in section fifty-two hundred and thirty-six, the

Comptroller of the Currency shall have paid to each and every creditor of such association, not including shareholders, who are creditors of such association, whose claim or claims as such creditors shall have been approved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof thirty days in a newspaper published in a town, city or county where the business of such association was carried on, or if no newspaper is so published, in a newspaper published nearest thereto; at such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, and in so determining the said shareholders shall vote by ballot in person or by proxy, each share of stock entitling the holder to one vote, and a majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued or whether an agent shall be elected. In case such majority shall determine that the said receiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust, and shall sell, dispose of or otherwise collect the assets of said association, and shall possess all the powers and authority, and be subject to all the duties and liabilities originally conferred or imposed upon him by his appointment as such receiver, so far as the same remain applicable. In case the said meeting shall by the vote of the majority of the stock in value and number of shares determine that an agent shall be elected, the said meeting shall thereupon proceed to elect an agent, voting by ballot in person or by proxy, each share of stock entitling the holder to one vote, and the person who shall receive votes representing at least a majority in value and number, shall be declared the agent for the purposes hereinafter provided, and whenever any of the shareholders of the association shall, after the election of such agent, have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of any and every claim that may thereafter be approved and allowed by and before a competent court, and for the faithful performance of all and singular the duties of such agent, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets of such association then remaining in the hands or subject to the order and control of said Comptroller and said receiver, or either of them; and for this purpose said Comptroller and said receiver are hereby severally empowered and directed to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper, and upon the execution and delivery of such instrument to the said agent, the said Comptroller and the said receiver shall, by virtue of this act, be dis-

charged from any and all liabilities of such association, as to each and all the creditors and shareholders thereof. Upon receiving such deed, assignment, transfer, or other instrument, the person elected such agent shall hold, control, and dispose of the assets and property of such association which he may receive under the terms hereof, for the benefit of the shareholders of such association, and he may in his own name or in the name of such association sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands, and may sell, compromise, or compound the debts due to such association, with the consent and approval of the circuit or district court of the United States for the district where the business of such association was carried on, and shall, at the conclusion of his trust, render such district or circuit court a full account of all his proceedings, receipts, and expenditures as such agent, which court shall upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon said bond. At such meeting, held as hereinbefore provided, administrators or executors of deceased shareholders may act and do as the decedent might have done if living, and guardians of minors, and trustees of other persons may so act and sign for their ward or *cestui que trust*. The proceeds of the assets or property of any such association which may be undistributed at the time of such meeting or may be subsequently received, shall be distributed as follows:

First. To pay the expenses of the trust to the date of such payment.

Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders to such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency, in accordance with the provisions of the statutes of the United States; and

Third. The balance ratably among such stockholders in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time, as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent.

Section three of the Act of June 30, 1876, and of the Act of August 3, 1892, was, by Act of March 2, 1897, amended as follows:

§ 3. After the words "discharge said agent and the sureties upon said bond," the following was inserted: And in case any such agent so elected shall refuse to serve, or die, resign, or be removed, any shareholder may call a meeting of the shareholders of such association in the town, city, or village where the business of said association was carried on, by giving notice thereof for thirty days in a newspaper published in said town, city or village, or if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and shall have executed a bond to the shareholders conditioned

for the faithful performance of his duties, in the penalty fixed by the shareholders at said meeting, with two sureties, to be approved by the judge of a court of record, and file said bond in the office of the clerk of the court of record in the county where the business of said association was carried on, he shall have all the rights, powers and duties of the agent first elected as hereinbefore provided.

SEC. 5235. NOTICE TO PRESENT CLAIMS.—The Comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof.

SEC. 5236. DIVIDENDS.—From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

SEC. 5237. INJUNCTION AGAINST COMPTROLLER.—Whenever an association against which proceedings have been instituted, on account of any alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an agent, as provided in section fifty-two hundred and twenty-seven, apply to the nearest circuit, or district, or territorial court of the United States to enjoin further proceedings in the premises; and such court, after citing the Comptroller of the Currency to show cause why further proceedings should not be enjoined, and after the decision of the court or finding of a jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States, shall make an order enjoining the Comptroller, and any receiver acting under his direction, from all further proceedings on account of such alleged refusal.

Act of March 29, 1886, 24 Stat. 8, provides that whenever the receiver of any national bank duly appointed by the Comptroller of the Currency, and who shall have duly qualified and entered upon the discharge of his trust, shall find it in his opinion necessary, in order to fully complete and execute his said trust, to the extent of any and all equities that such trust may have in any property, real or personal, by reason of any bond, mortgage, assignment, or other legal claim attached thereto, and which said property is to be sold under an execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value

of the property to be sold, and the value of the equity his said trust may have in the same, to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale.

§ 2. That such request, if approved by the Comptroller of the Currency, shall be, together with the certificate of facts in the case, and his recommendation as to the amount of money which, in his judgment, shall be so used and employed, submitted to the Secretary of the Treasury, and if the same shall likewise be approved by him, the request shall be by the Comptroller of the Currency allowed, and notice thereof, with copies of the request, certificate of facts, and endorsement of approvals, shall be filed with the Treasurer of the United States.

§ 3. That whenever any such request shall be allowed as hereinbefore provided, the said Comptroller of the Currency shall be, and is, empowered to draw upon and from such amount of any such trust as may be deposited with the Treasurer of the United States for the benefit of the bank in interest, to the amount as may be recommended and allowed and for the purpose for which such allowance was made; provided, however, that all payments to be made for or on account of the purchase of any such property or under any such allowance shall be made by the Comptroller of the Currency direct, with the approval of the Secretary of the Treasury, for such purpose only and in such manner as he may determine and order.

Act of March 3, 1887, 24 Stat. 554, corrected by 25 Stat., provides that whenever in any cause, pending in any court of the United States, there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated in the same manner as the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate the provisions of this section, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 3. That every receiver or manager of any property, appointed by any court of the United States, may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

SEC. 5238. FEES AND EXPENSES.— All fees for protesting the notes issued by any national banking association shall be paid by the person procuring the protest to be made, and such association shall be liable therefor;

but no part of the bonds deposited by such association shall be applied to the payment of such fees. All expenses of any preliminary or other examinations into the condition of any association shall be paid by such association. All expenses of any receivership shall be paid out of the assets of such association before distribution of the proceeds thereof.

SEC. 5239. PENALTY FOR VIOLATION.—If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity, for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

SEC. 5240. APPOINTMENT OF EXAMINERS.—The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall, as often as shall be deemed necessary or proper, appoint a suitable person or persons to make an examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association, and, in doing so, to examine any of the officers and agents thereof on oath; and shall make a full and detailed report of the condition of the association to the Comptroller. That all persons appointed to be examiners of national banks not located in the redemption cities specified in section fifty-one hundred and ninety-two, of the Revised Statutes of the United States, or in any one of the States of Oregon, California and Nevada, or in the Territories, shall receive compensation for such examination as follows: For examining national banks having a capital less than one hundred thousand dollars, twenty dollars; those having a capital of one hundred thousand dollars, and less than three hundred thousand dollars, twenty-five dollars; those having a capital of three hundred thousand dollars and less than four hundred thousand dollars, thirty-five dollars; those having a capital of four hundred thousand dollars and less than five hundred thousand dollars, forty dollars; those having a capital of five hundred thousand dollars and less than six hundred thousand dollars, fifty dollars; those having a capital of six hundred thousand dollars and over, seventy-five dollars, which amounts shall be assessed by the Comptroller of the Currency upon, and paid by, the respective associations so examined; and shall be in lieu of the compensation and mileage heretofore allowed for making said examinations, and persons appointed to make examination of national banks in the cities named in section fifty-one hundred and ninety-two of the Revised Statutes of the United States, or in any one of

the States of Oregon, California, and Nevada, or in the Territories, shall receive such compensation as may be fixed by the Secretary of the Treasury upon the recommendation of the Comptroller of the Currency; and the same shall be assessed and paid in the manner hereinbefore provided.

SEC. 5241. VISITORIAL POWERS.—No association shall be subject to any visitorial powers other than such as are authorized by this title, or are vested in the courts of justice.

SEC. 5242. FRAUDULENT TRANSFERS AND PREFERENCES.—All transfers of notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

SEC. 5243. THE TERM "NATIONAL."—All banks not organized and transacting business under the national currency laws, or under this title, and all persons or corporations doing the business of bankers, brokers, or savings institutions, except savings banks authorized by Congress to use the word "national" as a portion of the name or title of such bank, corporation, firm or partnership, are prohibited from using the word "national" as a portion of the name or title of such bank, corporation, firm or partnership; and any violation of this prohibition committed after the third day of September, eighteen hundred and seventy-three, shall subject the party chargeable therewith to a penalty of fifty dollars for each day during which it is committed or repeated.

Act of March 3, 1883, repealed the taxes levied by the United States on the capital and deposits of banks, bankers and national banking associations, and the stamp tax on bank checks and drafts.

Act of June 13, 1898, imposed special tax annually as follows: Bankers using or employing a capital not exceeding the sum of twenty-five thousand dollars shall pay fifty dollars; when using or employing a capital exceeding twenty-five thousand dollars, for every additional thousand dollars in excess of twenty-five thousand dollars, two dollars, and in estimating capital surplus shall be included. The amount of such annual tax shall, in all cases, be computed on the basis of the capital and surplus for the preceding fiscal year. Every person, firm, or company, and every incorporated or other bank, having a place of business where credits are obtained by the deposit or collection of money

or currency, subject to be paid or remitted upon draft, check or order, or where money is advanced or loaned, on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or sale, shall be a banker under this act: *Provided*, that any savings bank having no capital stock and whose business is confined to receiving deposits and loaning or investing the same for the benefit of its depositors, and which does not do other business of banking, shall not be subject to this tax.

By the same act the following stamp duties were imposed: Bank check, draft, or certificate of deposit not drawing interest, or order for the payment of any sum of money, drawn upon or issued by any bank, trust company, or any person or persons, companies or corporations, at sight or on demand, two cents. Bills of exchange (inland), draft, certificate of deposit drawing interest, or order for the payment of any sum of money, otherwise than at sight or on demand, or any promissory note except bank notes issued for circulation, and for each renewal of the same, for a sum not exceeding one hundred dollars, two cents; and for each additional one hundred dollars or fractional part thereof, in excess of one hundred dollars, two cents. And from and after the first day of July, 1898, the provisions of this paragraph shall apply as well to original domestic notes ordinarily issued by the Government of the United States, and the price of such money orders shall be increased by a sum equal to the value of the stamps herein provided for. Bills of exchange (foreign), or letters of credit (including orders by telegraph or otherwise, for the payment of money issued by express or other companies, or any person or persons), drawn in but payable out of the United States, if drawn singly or otherwise than in a set of three or more, according to the custom of merchants and bankers, shall pay for a sum not exceeding one hundred dollars, four cents, and for each one hundred dollars or fractional part thereof in excess of one hundred dollars, four cents. If drawn in sets of two or more: For every bill of each set, where the sum made payable shall not exceed one hundred dollars, or the equivalent thereof, in any foreign currency in which such bill may be expressed, according to the standard of the value fixed by the United States, two cents; and for each one hundred dollars or fractional part thereof in excess of one hundred dollars, two cents. Bills of lading or receipt (other than charter party) for any goods, merchandise, or effects to be exported from a port or place in the United States to any foreign port or place, ten cents.

ADDENDUM.

Bills of Lading.—The statement made on page 299 in regard to the duty of a bank in collecting a draft attached to or accompanied by a bill of lading, while technically correct, may seem to be misleading, and therefore needs amplifying. The question may present itself in different ways. Thus the draft may be an ordinary sight draft, a draft payable at sight without grace, a draft payable so many days after date or at a fixed date, or upon demand or so many days after demand. The rule is reasonably well settled that, if the accompanying draft is a time draft, and by this term the courts mean sight drafts with grace,¹ drafts payable so many days after sight² or after demand, and drafts payable at a fixed day,³ the bank may deliver the bill of lading upon acceptance of the draft. The reason for the rule is said to be that such a draft imports a sale upon credit. This reason is wholly inadequate as to drafts payable at a fixed day, *i. e.*, so many days after date or upon a day named, for the reason that those drafts need no presentation for acceptance,⁴ and the drawer may very well consider that the bank collecting will not present such a draft for acceptance, and the transmitting bank which has discounted the draft, with the bill of lading as collateral security, may reasonably assume the same thing. It is true that such a draft may be presented for acceptance,⁵ and if acceptance be refused notice must be given,⁶ and the draft, if dishonored, needs no presentation for payment, according to the authorities.⁷ But the collecting bank upon receiving such a draft for collection may hold it until maturity and then

¹ *National Bank v. Merchants' Bank*, 91 U. S. 92 (here one of the drafts was a sight draft); *Marine Bank v. Wright*, 48 N. Y. 1 (here the draft was a sight draft). *Second Nat. Bank v. Cummings*, 89 Tenn. 609 is *contra* as to a sight draft. The court in this last case cited *National Bank v. Merchants' Bank*, *supra*, but had not read it far enough to see that sight drafts with grace are treated as time drafts.

² *National Bank v. Merchants' Bank*, 91 U. S. 92; *Commercial Bank v. Railway Co.*, 160 Ill. 401; *Moore v. Louisiana Nat. Bank*, 44 La. Ann. 90 (draft at one day's sight).

³ *Woolen v. New York Bank*, 12 Blatchf. 359.

⁴ See p. 349, *ante*.

⁵ See pp. 389, 390, *ante*.

⁶ See pp. 389, 390, *ante*.

⁷ See pp. 374, 389, 466, *ante*.

present for payment; and necessarily the bill of lading would be held until payment. Yet the rule is held that such a time draft imports a sale upon credit. The drawer of the draft or the transmitting bank, if it desires the bill of lading to be held until payment, and wishes the draft to be a time draft, should draw the draft payable at a day certain, and give instructions to the collecting bank to present the draft for payment but not for acceptance, or the drawer should draw a demand draft, upon which the bill of lading cannot be delivered except upon payment.⁸ If a draft is a sight draft without grace, it is a demand draft, and the bill of lading cannot be delivered except upon payment. But, as it will appear a little further along, instructions to the collecting bank are not necessarily a full protection.

How far a bank is safe in taking a bill of lading as collateral security depends upon various considerations. It is reasonably well agreed that the bill of lading is a symbol of property, and when delivered transfers the property as against every subsequent purchaser or claimant under the transferror of the bill of lading.⁹ But the bill of lading is only *quasi*-negotiable, and delivered as a bill of sale transfers merely the transferror's title.¹⁰ If he had no title, the transferee of the bill of lading gets none. A bank should not assume that a bill of lading is necessarily a good security, unless it knows that the apparent owner of the goods is the real owner. The liability of the bank upon the bill of lading to the consignee, or the person to whom the bill of lading is delivered, is nothing. For although the bill of lading indorsed or delivered unindorsed¹¹ transfers the legal title to the bank, yet it is the legal title only for the purposes of the lien; and when the bill of lading is delivered, it is delivered as and for the consignor of the goods or drawer of the draft. The bank may make, it seems, representations as to the goods, and yet not be held, because such representations would not be binding.¹² The propriety of such a rule seems open to grave objections.

⁸ All the cases hereinbefore cited admit that a draft payable instantly does not import a credit, but a cash sale.

⁹ *Shaw v. Railroad Co.*, 101 U. S. 557.

¹⁰ *Shaw v. Railroad Co.*, *supra*. But one case seems *contra*, *Morse v. Chicago, etc. R. R. Co.*, 73 Iowa, 226; but this case may be justified upon the ground that the delivery of possession by the vendor to the vendee of goods, who shipped them and took out bills of lading which he delivered unindorsed to the bank,

converted his cash sale into a sale upon credit. The statute, too, may have seemed to have some effect. The bank's lien was held superior to the title of the original vendor.

¹¹ *Morse v. Chicago, etc. R. R. Co.*, 73 Iowa, 226.

¹² *Littleton v. People's Bank*, 63 N. W. R. 666. The representation was: "Mr. R. has drawn on you to-day \$2,230. Will ship you next Monday night or Tuesday morning one car of hogs and one of cattle. Cattle are good." Signed by the name of the cashier as cashier. The

A further question presents itself and may be stated in this way: What is the effect of an acceptance of the draft upon the title to the property which is covered by the bill of lading? It will not be disputed that if the draft be a demand draft or a sight draft without grace, the acceptance of the draft will not in itself convey title to the goods, because the transaction imported is a sale for cash. Even though the bill of lading be delivered upon an acceptance of such a draft, the transferee knows that the bank had no authority to deliver the bill of lading except upon payment, unless he had a contract with the assignor for a sale upon credit, which would not affect the bank's lien. Instructions to the collecting bank not to deliver are not necessary. By such a delivery the collecting bank itself would become liable for the loss resulting. But third parties, the railroad company or the carrier, and those claiming under the transferee of the bill of lading, having no notice of the wrongful delivery of the bill of lading, may treat with the transferee as owner. Suppose, however, the drawer of the draft or the transmitting bank notifies the railroad company before its delivery of the goods to the transferee, or makes a common-law sale of the goods to some one else, who notifies the railroad company before its delivery, what would be the result? If the transferee and acceptor should pay the draft, his title would be perfect, of course. If he should not pay the draft, the consignor or his vendee would have title, and the carrier would be held accordingly. Taking the case, now, of a time draft, *i. e.*, a draft payable at sight with grace, a draft payable so many days after sight or after demand, or payable at a day certain, two cases would present themselves: (1) Where instructions had been given the collecting bank not to deliver the bills of lading except upon payment; (2) where no instructions had been given. If the bank, in violation of its instructions, should deliver the bills of lading, the condition would not be different than if it had wrongly delivered upon a demand draft or sight draft without grace, except that the transferee would have no notice of the lack of power in the collecting bank to deliver, unless his contract with the consignor was for a cash sale. But this very fact of delivery would determine that title passed to the transferee without notice, because if without notice he would assume, and would have the right to assume, that he would obtain title by the delivery, and the other party, having invested his collecting agent with the apparent right to deliver, would be

court decides that this representation was *ultra vires*. It should have held that there was nothing to show any representation. The statement was not one of fact, but a promise if anything. There was no representation as to the quantity of cattle or hogs. It did not ap-

pear that the representation as to the cattle was false. The court, with a plain ground of correct decision, put its ruling upon a most unsatisfactory ground. It could also have said that no sensible person would re'y on the telegram as any statement of the number shipped.

estopped to dispute the authority. But if the transferee of the bill of lading had notice of the instructions or knew that his contract was not for a sale upon credit, he would get no more title than if the draft had been a demand draft or one at sight without grace. Where no instructions have been given to the collecting bank, that bank on delivery of the bill of lading incurs no liability, and the transferee of the bill of lading gets a good title, if he had no notice that the sale was for cash, and had no notice of the instructions to the bank. Third parties, even if the transferee had notice, may treat the holder of the bill of lading as owner, until notice of a contrary state of facts. But the question goes further than this. Does the acceptance, of itself, without a delivery of the bill of lading, give title to the goods when the draft is a time draft, as above explained? The transferee, where the bill of lading is not delivered, must know that the bill of lading is being held until payment, and as a security for payment. Third parties are presumed to know this fact because the transferee has not the bill of lading, the symbol of ownership. Therefore it would seem upon reason that the title in the goods did not pass merely by reason of acceptance; yet plain as this conclusion seems, it has been held in a case that is erroneous, both in what it affirms and in what it denies, that if the bill of lading is not delivered title passes upon acceptance of a time draft, and the carrier may safely deliver to the acceptor of the bill of lading, provided no instructions have been given not to deliver the bill of lading.¹³ This case is wrong because it confuses the matter of the liability of the collecting bank with the matter of title to the goods covered by the bill of lading. It may very well be that the collecting bank would not be liable for delivering the draft upon acceptance, and might assume that the sale was upon credit; but it does not follow that where it does not deliver, and does not assume the sale to be upon credit, the sale is necessarily one upon

¹³ Commercial Bank v. Railway Co., 160 Ill. 401. This decision is one of those *per curiam* offspring which each judge refuses to father. It holds that title in the goods covered by the bill of lading passes upon acceptance, if no instructions were given not to deliver, even though the bill of lading was not delivered. But it ought to have been plain that the non-delivery of the bill of lading was notice that the sale was not upon credit. The proof that seems to have been offered was not satisfactory, but the decision as a judgment (not in

what it argues) may be correct, because the facts showed that the sale was upon credit and was so understood between the parties. The court's statement about instructions given preventing the title passing is mere *dictum* and is wrong, because the instructions would be material as to the transferee's title, if he had notice, but not otherwise. His title depended upon the contract as made, or if there was no contract express or implied, as a fact, what was done at the time would govern.

credit. That must depend upon the contract between the parties, to be gathered from all the means of information, including the course of dealing between the parties and customs of the business.

Clearing-house Indorsements.—The rule has been made in one clearing-house and extensively adopted, that no draft or check will be passed through the clearing-house unless it be a check or draft whose indorsements show full ownership in the bank transmitting the paper for collection. This rule has been drawn forth by a decision to the effect¹ that where the collecting bank acts as agent in collecting and has wrongly received payment upon a check or draft, but has transmitted the proceeds to its principal, it is not liable to the party from whom it wrongly collected where that party had notice of the agency, as it would have by indorsements for collection, for collection and credit, for account, and perhaps for credit.² This rule is made by the banks for their own protection. It will obviate many troublesome questions as to the ownership of the proceeds of a collection and as to mutual credits between banks upon insolvency.³

¹See p. 300, *ante*, note 1, for the decisions upon the point.

²See pp. 208, 297, 316, *ante*.

³See pp. 297, 298.

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